

Offshore Tax Enforcement and Divorce

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High-net-worth taxpayers continue to hide assets offshore, and offshore tax enforcement remains an immense problem for the United States. In 2016, the Panama Papers revealed another previously unnoticed reason that high-net-worth tax cheats place assets offshore: to hide them from their spouses during divorce proceedings. Typically, these offshore tax evaders also will refuse to disclose their offshore accounts during divorce proceedings even though required to do so. The individuals hiding offshore assets in this manner are predominantly males. Ultimately, their wives are forced to hire forensic accountants to trace an extensive maze of offshore ownership during the divorce.

This Article proposes a novel solution to the problem of offshore tax enforcement by using high-net-worth divorces. Currently, an offshore tax evader may frustrate his wife's attempts to discover family assets held offshore during divorce proceedings and still remain eligible for tax amnesty programs. Moreover, he can later claim that he did not "willfully" hide assets from tax authorities and thereby escape criminal prosecution. This Article solves these two problems in a manner that will strengthen offshore tax enforcement while truncating prolonged divorce proceedings.

In addition, currently, a wife who learns of her husband's offshore tax fraud during divorce will face civil and criminal liability as well, unless she can secure innocent spouse relief. Such relief is difficult to attain due to existing inequities and misperceptions about financial and other forms of domestic abuse. As a result, our current approach protects the guilty, high-net-worth tax cheat who refuses to disclose his offshore assets either to tax authorities or to his wife. At the same time, it diminishes the chances that his wife will ever whistle blow to the Internal Revenue Service by failing to protect her from civil and criminal liability. This Article argues for reforms in the areas of family law and tax law that would (1) hold high-net-worth husbands accountable for noncompliance in both contexts and (2) incentivize

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wives to whistle blow using information about offshore assets gathered from the divorce proceedings.

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I. INTRODUCTION

In the last two years, the American public has become keenly aware of hidden issues that will shape our nation’s legal landscape, debates, and choices for decades to come.¹ These developments have relevant implications for another issue related to secrecy: the hiding of offshore wealth.² According to a recent Tax Justice Network report, wealthy individuals are holding over \$21 trillion to \$32 trillion of unreported private wealth offshore.³ Offshore tax enforcement is a legal regime aimed at catching wealthy tax evaders that remains a top priority for the Internal Revenue Service (IRS) in 2018.⁴ However, the United States largely ignores a context where information regarding offshore assets is gleaned, i.e., high-net-worth divorce proceedings.⁵

It is undeniable and commonly known that one use of offshore accounts is to hide assets from tax authorities.⁶ Nevertheless, the Panama Papers revealed

¹ See *infra* notes 6–27 and accompanying text.

² *Id.*

³ See JAMES S. HENRY, *THE PRICE OF OFFSHORE REVISITED* 36 (2012), http://www.taxjustice.net/cms/upload/pdf/Price_of_Offshore_Revisited_120722.pdf [<https://perma.cc/Z3BK-ELVP>].

⁴ I.R.S. News Release IR-2018-64 (Mar. 20, 2018), <https://www.irs.gov/newsroom/irs-offshore-tax-cheating-remains-on-dirty-dozen-list-of-tax-scams> [<https://perma.cc/3UYV-M2SS>]; I.R.S. News Release IR-2017-35 (Feb. 16, 2017), <https://www.irs.gov/newsroom/irs-committed-to-stopping-offshore-tax-cheating-remains-on-dirty-dozen-list-of-tax-scams-for-2017> [<https://perma.cc/Z5DB-3FX6>] [hereinafter IRS, “Dirty Dozen” News Release] (“Offshore compliance remains a top IRS priority.”). The IRS has noted that the avoidance of taxes by “hiding money or assets in unreported offshore accounts” remains on its list of top tax scams known as the ‘Dirty Dozen.’ *Id.*

⁵ See *infra* Part I.A.

⁶ See Scott D. Michel et al., *U.S. Offshore Account Enforcement Issues*, 16 J. TAX PRAC. & PROC. 49, 49–73 (2014); Carolyn Michelle Najera, Note, *Combating Offshore Tax Evasion: Why the United States Should Be Able to Prevent American Tax Evaders from Using Swiss Bank Accounts to Hide Their Assets*, 17 SW. J. INT’L L. 205, 206–07 (2011); see also Shu-Yi Oei, *The Offshore Tax Enforcement Dragnet*, 67 EMORY L.J. 655, 732 (2018) (explaining one of the largest challenges facing the United States is “to catch and enforce the law against egregious and willful high-net-worth tax evaders”); Lawrence J. Trautman,

another less obvious use of offshore accounts: hiding assets from a spouse during a divorce.⁷ The Panama Papers divulged that public officials, drug dealers, money launderers, and unexpectedly, high-net-worth divorcees all use offshore accounts to hide assets.⁸ The source of the leak was a Panamanian firm named Mossack Fonseca, and it confessed to at least considering aiding wealthy individuals with hiding assets from their spouses in a type of pre-divorce planning designed to prevent a claim to those assets.⁹

In October 2017, the #MeToo movement¹⁰ and the indictment of President Trump's former campaign manager, Paul Manafort, showed the world that powerful men also must face consequences for their misdeeds, including their offshore ones.¹¹ Last year, the momentum of the anti-sexual harassment #MeToo movement thrust the hidden marginalization and objectification of both famous and unknown women alike into unwavering light for all to see.¹² No longer would the latent sins of prominent American men remain out of focus due to the courage of women.

Later in October 2017, the indictment of Manafort for failure to report foreign bank and financial accounts, inter alia, brought the secret world of offshore companies and assets to sharp focus yet again.¹³ Recently, the IRS has

Following the Money: Lessons from the Panama Papers, Part 1: Tip of the Iceberg, 121 PENN ST. L. REV. 807, 809–10 (2017).

⁷ See, e.g., Ana Swanson, *How the World's Wealthy Hide Millions Offshore – From Their Spouses*, WASH. POST (Apr. 19, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/04/19/how-the-worlds-wealthy-hide-millions-offshore-from-their-spouses/?utm_term=.b0638d4cf3ad [<https://perma.cc/EEA9-UM2P>].

⁸ See, e.g., *id.*; Will Fitzgibbon, *How the One Percenters Divorce: Offshore Intrigue Plays Hide and Seek with Millions*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 3, 2016), <https://panamapapers.icij.org/20160403-divorce-offshore-intrigue.html> [<https://perma.cc/6HHD-CE83>].

⁹ See Swanson, *supra* note 7.

¹⁰ See, e.g., Jessica Bennett, *The #MeToo Moment: No Longer Complicit*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/us/the-metoo-moment-no-longer-complicit.html> [on file with the *Ohio State Law Journal*].

¹¹ See, e.g., Robert W. Wood, *IRS Tax Lessons for Everyone from Paul Manafort Indictment*, FORBES (Oct. 31, 2017), <https://www.forbes.com/sites/robertwood/2017/10/31/irs-tax-lessons-for-everyone-from-paul-manafort-indictment/#18010881754b> [<https://perma.cc/ENY4-UHBL>].

¹² See Bennett, *supra* note 10.

¹³ Indictment at 19–20, *United States v. Manafort* 313 F. Supp. 3d 213 (D.D.C. 2018), (No. 1:17-cr-00201) [hereinafter *Indictment*] (alleging that from 2008 through 2014, Manafort did not file a FBAR or indicate on Schedule B that he owned foreign bank accounts). U.S. citizens are required to file a form, known as a Foreign Bank and Financials Account Report (FBAR), if they control (directly or through a legal entity) a foreign bank account that has a balance over \$10,000 at any time during the taxable year. 31 U.S.C. § 5314 (2012); 31 C.F.R. § 1010.350 (2018); *Report of Foreign Bank and Financial Accounts (FBAR)*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/report-of-foreign-bank-and-financial-accounts-fbar> [<https://perma.cc/YF5N-R67V>] (last updated Jan. 28, 2019) (stating under “Who Must File an FBAR” those required to file are United Persons with a financial interest in or signatory authority over at least one

noted that individuals who maintain foreign financial accounts and fail to comply with U.S. reporting requirements “are breaking the law and risk significant fines, as well as the possibility of criminal prosecution.”¹⁴ The indictment alleges, “Manafort used his hidden overseas wealth to enjoy a lavish lifestyle in the United States, without paying taxes on that income.”¹⁵ It also contends that Manafort and Rick Gates “funneled millions of dollars in payments into foreign nominee companies and bank accounts, opened by them and their accomplices in . . . Cyprus, Saint Vincent & the Grenadines . . . and the Seychelles.”¹⁶ FBI agents entered Mr. and Mrs. Manafort’s condominium before dawn after the indictment,¹⁷ and ultimately, on August 21, 2018, Manafort was convicted of eight counts of tax and bank fraud, including one count of not reporting a foreign bank account.¹⁸ Mrs. Manafort, an attorney, has been involved with her husband’s multi-million-dollar real estate acquisitions.¹⁹ It is unclear whether she was aware of her husband’s failure to report offshore accounts.²⁰

Meanwhile, in early 2018, former White House staff secretary Rob Porter’s two ex-wives exposed just how incorrectly the United States perceives domestic violence and abuse in alleging their former husband engaged in verbal and

foreign financial account and whose aggregate foreign financial accounts exceed \$10,000 at any point during the calendar year). Additionally, Form 1040 requires taxpayers to answer questions on Schedule B regarding the existence of foreign bank accounts. *About Schedule B (Form 1040), Interest and Ordinary Dividends*, INTERNAL REVENUE SERV., <https://www.irs.gov/forms-pubs/about-schedule-b-form-1040> [<https://perma.cc/G5QZ-ZNBX>] (last updated Dec. 7, 2018).

¹⁴ See IRS, “Dirty Dozen” News Release, *supra* note 4.

¹⁵ Indictment, *supra* note 13, at 2; see Rowan Scarborough, *FBI Agents Manhandled Manafort and His Wife During Pre-Dawn Raid in Intimidation Effort*, WASH. TIMES (Nov. 1, 2017), <https://www.washingtontimes.com/news/2017/nov/1/fbi-agents-manhandled-manafort-and-his-wife-during/> [<https://perma.cc/5SLE-2ZRB>].

¹⁶ Indictment, *supra* note 13, at 2.

¹⁷ See Scarborough, *supra* note 15.

¹⁸ Sharon LaFraniere, *Paul Manafort, Trump’s Former Campaign Chairman, Guilty of 8 Counts*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/politics/paul-manafort-trial-verdict.html> [<https://perma.cc/3824-35JH>].

¹⁹ See Áine Cain, *Paul Manafort’s Wife Kathleen Has Been a Quietly Pivotal Part of the Investigation Against Him—Here’s Everything We Know*, BUS. INSIDER (Oct. 31, 2017), <https://www.businessinsider.in/law-order/paul-manaforts-wife-kathleen-has-been-a-quietly-pivotal-part-of-the-investigation-against-him-heres-everything-we-know/articleshow/61350660.cms> [<https://perma.cc/U4E3-RHLS>] (explaining that Kathleen Manafort’s role in tax fraud is not lucid but noting funds from offshore accounts were used to purchase U.S. real estate, including properties in New York and Virginia); Scarborough, *supra* note 15. An IRS agent testified that approximately \$9 million was transferred from Manafort’s offshore accounts to the United States and about \$6.7 million of this amount was used to purchase personal real estate in New York and Virginia. Del Quentin Wilber & Aruna Viswanatha, *IRS Agent Testifies Manafort Failed to Declare More than \$16 Million on Taxes*, WALL ST. J. (Aug. 8, 2018), <https://www.wsj.com/articles/forensic-accountant-next-up-in-manafort-trial-as-gates-ends-testimony-1533748826> [<https://perma.cc/Q3X4-MQGM>].

²⁰ Cain, *supra* note 19.

physical abuse.²¹ Porter's second wife, Jennie Willoughby, poignantly stated: "Society as a whole doesn't acknowledge the reality of abuse."²² Ms. Willoughby has pointed out the cultural norm that often pervades our legal system, as well as the questioning of the victim of the abuse instead of embarrassing an abuser.²³ Colbie Holderness, Porter's first wife, noted that often women are with their abusers for an extended period of time.²⁴ Ms. Holderness explained, "[t]hey marry them, become financially intertwined with them, have children with them."²⁵ Suddenly, U.S. politicians and the general public were asked to acknowledge that abuse happens to "the poor and the rich, the least educated and the most" and is committed by those with "a stellar résumé and background."²⁶ Ultimately, Porter stepped down from his role after these allegations surfaced.²⁷

Examining these three stories, several questions arise that are relevant to how we view offshore tax enforcement. What if, similar to women prior to the #MeToo movement, wives of wealthy tax evaders fear the implications of disclosing their husbands' bad tax behavior and thus have remained silent, even during divorce? An article in the U.K. *Guardian* disclosed that several members of President Trump's Administration, including his chief economic adviser who spearheaded the latest tax reform effort, have offshore dealings, providing further evidence of an offshore network comprised of wealthy U.S. men.²⁸

²¹ See Colbie Holderness, *Rob Porter Is My Ex-Husband. Here's What You Should Know About Abuse.*, WASH. POST (Feb. 12, 2018), https://www.washingtonpost.com/opinion/rob-porter-is-my-ex-husband-heres-what-you-should-know-about-abuse/2018/02/12/3c7edcb8-1033-11e8-9065-e55346f6de81_story.html?utm_term=.92486d5654e4 [<https://perma.cc/6Y3F-4RBJ>].

²² Jennie Willoughby, 'President Trump Will Not Diminish My Truth,' TIME (Feb. 11, 2018), <http://time.com/5143589/rob-porter-ex-wife-trump-domestic-violence/> [<https://perma.cc/P65H-B6JL>]; see Maggie Haberman & Katie Rogers, *Rob Porter, White House Aide, Resigns After Accusations of Abuse*, N.Y. TIMES (Feb. 7, 2018), <https://www.nytimes.com/2018/02/07/us/politics/rob-porter-resigns-abuse-white-house-staff-secretary.html> [<https://perma.cc/Y8UV-2ABJ>].

²³ See Willoughby, *supra* note 22. ("The tendency to avoid, deny, or cover up abuse is never really about power, or money, or an old boys' club. It is deeper than that. Rather than embarrass an abuser, society is subconsciously trained to question a victim of abuse.").

²⁴ Holderness, *supra* note 21.

²⁵ *Id.*

²⁶ See *id.*; Michael Levenson, *Rob Porter Was 'Quintessential Golden Boy' from Belmont Now Accused of Abuse*, BOS. GLOBE (Feb. 9, 2018), <https://www.bostonglobe.com/metro/2018/02/09/rob-porter-was-quintessential-golden-boy-from-belmont-now-accused-abuse-two-wives/NloiHioR0akJShDV2AqD4O/story.html> [<https://perma.cc/9DR9-4PZH>] (commenting that Rob Porter is a Rhodes Scholar and a Harvard Law School graduate).

²⁷ See Willoughby, *supra* note 22; Levenson, *supra* note 26.

²⁸ See Jon Swaine & Ed Pilkington, *The Wealthy Men in Trump's Inner Circle with Links to Tax Havens*, THE GUARDIAN (Nov. 5, 2017), <https://www.theguardian.com/news/2017/nov/05/wealthy-men-donald-trump-inner-circle-links-tax-havens> [<https://perma.cc/EK4A-APZ3>] (listing ten political officers, including Randal Quarles: "The Trump administration's most senior banking watchdog [who] appears in the Paradise Papers in connection with an offshore bank that is under investigation by U.S. authorities for possible tax evasion."); see

Surely, some of the men in this offshore circle have gone through one or more divorces. Why did their wives choose not to inform the IRS of their husbands' offshore holdings through the IRS Whistleblower Program?

Imagine if Mr. and Mrs. Manafort were in the process of divorce at the time of the FBI raid, and she had learned during the divorce that her husband had engaged in tax fraud and evasion. Would she provide information to the IRS and under what circumstances? What if Colbie Holderness or Jennie Willoughby had discovered during their divorces from Rob Porter that he also was engaging in offshore tax fraud and evasion? Should they have a shield from possible joint civil and criminal liability given their allegations of abuse? To summarize, the main question is the following: Are both the Department of Justice and the IRS missing out on an opportunity to impose civil and criminal liability on offshore tax evaders by failing to speak with wives during the divorce process? Relatedly, what can the United States do to empower wives who learn of offshore tax fraud and evasion during divorce proceedings to report the behavior to the IRS?

A. Noncompliance in Divorce & Offshore Tax Reporting

High-net-worth husbands who refuse to comply with the divorce discovery process and thus fail to disclose hidden offshore assets ("noncompliant spouses") are by nature also tax frauds and evaders.²⁹ If they were not, their wives would not have to hire forensic accountants and file motions to compel to discover an accurate financial picture.³⁰ They could simply look at prior and current year tax returns. The ability of noncompliant spouses to escape civil and criminal liability in the tax arena, despite their bad behavior in the family law context, is perplexing.

Under current law, a noncompliant spouse is able to frustrate his wife's attempts to discover family assets and accounts by failing to comply with discovery.³¹ However, at the end of the proceedings, there is no mechanism for reporting his attendant tax fraud, and he remains eligible for tax amnesty programs.³² Moreover, even if he decides to take a gamble and not divulge his tax wrongdoing under a tax amnesty program, he will likely escape criminal liability by alleging he did not know he had a legal duty to report or to pay tax on offshore income and assets, or in other words, that he did not act

also Ryan Tracy, *Meet Randal Quarles, Trump's Pick to Shake Up the Fed*, WALL ST. J. (July 28, 2018), <https://www.wsj.com/articles/meet-randal-quarles-trumps-pick-to-shake-up-the-fed-1501234201> [<https://perma.cc/VS5T-HSHX>] (describing Mr. Quarles's connection with President Trump).

²⁹ See Khrista McCarden, *Till Offshore Do Us Part: Uncovering Assets Hidden from Spouses and Tax Authorities*, 62 ST. LOUIS U. L.J. 19, 28–29 (2017).

³⁰ See *id.*; see also *infra* Part I.

³¹ See *infra* Part I.

³² See *infra* Part I.

“willfully.”³³ The government will bear a heavy burden of proving willfulness.³⁴

Even worse, his wife likely will face civil and criminal liability as well because of the joint and several liability that attaches with the filing of joint tax returns during marriage.³⁵ Her only chance of avoiding this result is to pursue innocent spouse relief under section 6015(c) or section 6015(f) of the Internal Revenue Code (I.R.C.).³⁶ However, she will face an almost insurmountable obstacle because knowledge of the receipt of money not reported to the IRS is enough to disqualify her in most cases, regardless if she knew nothing about the source of such money or the failure to report it.³⁷

The current mismatch in “knowledge” standards leads to a perverse result. A noncompliant spouse may claim that he lacked “knowledge” of tax reporting to escape liability.³⁸ Nevertheless, his wife’s mere “knowledge” that money was received is enough to disqualify her from innocent spouse relief, i.e., her one shield against joint civil and/or criminal liability.³⁹ Ultimately, our current law deters wives of noncompliant spouses from sharing information with the IRS about hidden offshore assets uncovered during divorce proceedings.⁴⁰

B. Hold High-Net-Worth Husbands Accountable & Empower Their Wives as IRS Whistleblowers

Offshore tax enforcement may be strengthened through high-net-worth divorce proceedings by utilizing a two-fold approach. First, we must curtail the ability of noncompliant spouses to use tax amnesty programs and assist the government and/or the IRS with establishing “willfulness” on the part of such offshore tax cheats. Second, we must shield unknowing wives from shared civil and criminal liability and thereby empower them to report offshore assets discovered during divorce through the IRS Whistleblower Program. Unfortunately, innocent spouse relief is difficult to achieve even in this instance because of existing inequities and the way judges, including those in Tax Court, view financial and other forms of domestic abuse. These misperceptions must change.

Part I argues that family law discovery devices should be modified in order to impute knowledge of reporting requirements to noncompliant spouses and that noncompliant spouses should be ineligible for voluntary disclosure programs and delinquent Report of Foreign Bank and Financial Accounts (FBAR) procedures and delinquent international information return

³³ See *infra* Part I.B.

³⁴ See *id.*

³⁵ See *infra* Part II.A.

³⁶ I.R.C. §§ 6015(c)(3)(C), (f) (2012); See *infra* Part II.B.

³⁷ See *infra* Part II.B–C.

³⁸ *Id.*

³⁹ See *infra* Part II.A.

⁴⁰ See *infra* Part II.

procedures⁴¹ that allow taxpayers to avoid criminal prosecution and cap civil penalties. Part II examines current challenges facing wives of noncompliant spouses in obtaining relief from the joint and several liability that attaches with the filing of joint returns during the marriage, or in other words, innocent spouse relief. Relatedly, the link between financial abuse and offshore tax evasion is explored to argue for extending innocent spouse relief to this group of wives in particular. Finally, Part III proposes that innocent spouse relief would enable these wives to serve as effective whistleblowers under the IRS Whistleblower Program.

This Article's proposed reform comes at a particularly relevant time. The IRS indicated in 2018 that stemming offshore tax evasion remains one of its main goals.⁴² Recent news stories show how widespread offshore dealings are, including among the politically prominent.⁴³ They also have revealed that when women are empowered to speak out about the misdeeds of men, even those of the highest socioeconomic rankings are held accountable for violating the law. In addition, recent headlines show that wives of powerful men are not strangers to abuse. While Tax Court may not seem like the obvious place for legal reform to our notions of domestic abuse, this Article challenges that idea. It sets forth a new framework for indemnifying financially abused wives from the offshore tax sins of their high-net-worth husbands and thus encouraging them to serve as whistleblowers.

II. NONCOMPLIANT SPOUSES IN THE DIVORCE AND OFFSHORE TAX CONTEXTS*

Given the ease associated with electronically transferring funds to countries today, it has become increasingly difficult to uncover assets that have been hidden offshore.⁴⁴ While in recent years there have been numerous efforts to combat offshore tax haven abuses—such as heavy penalties and new reporting

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⁴¹ For purposes of this Article, voluntary disclosure encompasses both the Offshore Voluntary Disclosure Program (OVDP) and the delinquent FBAR submission procedures and the delinquent international information return submission procedures, which will remain open after the 2014 OVDP closure on September 28, 2018. See *Closing the 2014 Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers*, INTERNAL REVENUE SERV., <https://www.irs.gov/individuals/international-taxpayers/closing-the-2014-offshore-voluntary-disclosure-program-frequently-asked-questions-and-answers> [<https://perma.cc/L95T-4WX4>] (last updated Nov. 30, 2018) [hereinafter *Closing the 2014 OVDP*] (addressing the OVDP closing at FAQs 1, 9, and 10); see also *infra* note 52.

⁴² See IRS, "Dirty Dozen" News Release, *supra* note 4.

⁴³ See, e.g., Swaine & Pilkington, *supra* note 28; Swanson, *supra* note 7.

⁴⁴ See HENRY, *supra* note 3, at 10.

requirements⁴⁵—a fundamental problem persists: the IRS does not have the time or resources to untangle the intricate maze of corporate structures used by wealthy individuals to hide their assets offshore.⁴⁶ The spouses of wealthy tax evaders do. In fact, the scope of divorce cases can far exceed that of federal tax investigations because they seek to “map the wealth of the some of the world’s richest people.”⁴⁷

The discovery process that is an integral part of divorce proceedings⁴⁸ is conducive to the unraveling of multiple chains of corporate ownership inherent in such “offshore planning.” Under I.R.C. § 7201, tax evasion is a felony that carries either a fine of up to \$250,000, or five years’ imprisonment, or both.⁴⁹ The three elements of the crime of tax evasion are (1) willfulness, (2) an attempt to evade tax, and (3) additional tax due.⁵⁰

Part I of this Article argues that discovery devices should be modified in order to impute knowledge of reporting requirements to a spouse refusing to comply with the discovery process—or what is termed a “noncompliant spouse”⁵¹—given the willfulness standard applies to all three categories of

⁴⁵ See, e.g., Leandra Lederman, Essay, *Reducing Information Gaps to Reduce the Tax Gap: When Is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733, 1742–43 (2010); Bryan C. Skarlatos & Michael Sardar, *Taxes and Penalties on Unreported Foreign Assets: Who Foots the Bill?*, 27 J. AM. ACAD. MATRIM. L. 83, 108 (2014); see also Oei, *supra* note 6, at 674–93 (providing a summary of recent offshore tax enforcement measures, including penalties and new information reporting requirements).

⁴⁶ IRS ADVISORY COUNCIL, GEN. REP. 11 (2011) (explaining there are still perhaps millions of noncompliant taxpayers who refuse to voluntarily come into compliance and recommending adequate funding for enforcement and compliance efforts by the Internal Revenue Service); Craig M. Boise, *Breaking Open Offshore Piggybanks: Deferral and the Utility of Amnesty*, 14 GEO. MASON L. REV. 667, 701 (2007) (addressing the use of voluntary disclosure programs to promote compliance of offshore tax evaders). See generally Itai Grinberg, *The Battle Over Taxing Offshore Accounts*, 60 UCLA L. REV. 304 (2012) (detailing the current initiatives used to uncover and tax offshore accounts).

⁴⁷ Swanson, *supra* note 7.

⁴⁸ See KALMAN A. BARSON, INVESTIGATIVE TECHNIQUES AND PROCEDURES FOR DETERMINING THE REALITY BEHIND THE FINANCIAL STATEMENTS (1986) (providing an overview of forensic accounting); LARRY RICE & NICK RICE, THE COMPLETE GUIDE TO DIVORCE PRACTICE: FORMS AND PROCEDURES FOR THE LAWYER 301–531 (5th ed. 2017) (discussing discovery in the context of divorce proceedings).

⁴⁹ This Article focuses on tax evasion under I.R.C. § 7201 (2012). However, the potential criminal charges related to tax matters in addition to tax evasion include filing a false return, I.R.C. § 7206(1), and failure to file an income tax return, *id.* § 7203. See *Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2012*, IRS, <https://www.irs.gov/individuals/international-taxpayers/offshore-voluntarydisclosure-program-frequently-asked-questions-and-answers> [<https://perma.cc/BY3J-EZL7>] (describing criminal penalties at FAQ 6).

⁵⁰ There are two offenses under I.R.C. § 7201: (a) the willful attempt to evade the assessment of tax and (b) the willful attempt to evade the payment of tax.

⁵¹ A refusal to comply with discovery requests generally results in the filing of one or more motions to compel. See FED. R. CIV. P. 37(a). For purposes of this Article, it is assumed

possible consequences for violating tax requirements. It also contends that noncompliant spouses in the divorce context should be ineligible for voluntary disclosure programs that allow taxpayers to avoid criminal prosecution and cap civil penalties.⁵² Strengthening the tax implications of failing to disclose assets in the divorce context would incentivize noncompliant spouses to comply with discovery from an early stage in the proceedings. This would lead to two benefits: (1) more expedient family court proceedings and (2) more timely and accurate reporting of hidden offshore assets of the noncompliant spouse and other associated tax evaders.⁵³

A. Hiding Offshore Assets from Spouses and the IRS

There is a predictable pattern in high-net-worth divorce proceedings that involves hiding assets from both a spouse and the IRS.⁵⁴ In fact, it is not unusual for a spouse who is hiding money offshore in anticipation of a divorce also to hide their assets from the IRS.⁵⁵ Typically, a wealthy spouse opens an account under the name of a shell company in a tax haven country, such as Panama, and transfers assets into the company to hide them from their spouse.⁵⁶ During the divorce proceedings, the wealthy spouse can claim that investments are tied up

that such noncompliant spouses have also refused to comply with the reporting requirements outlined herein.

⁵² The OVDP from prior years was replaced with the 2014 OVDP. There was no deadline for participating in the OVDP; however, the IRS retained the ability to revise or end the program at any point. See *Closing the 2014 OVDP*, *supra* note 41. Accordingly, the IRS announced the closing of the 2014 OVDP effective September 28, 2018, but the IRS indicated there may be future voluntary disclosure programs and began soliciting suggestions regarding such future programs. *Id.* (FAQ 1, 10, and 12). The IRS “streamlined” procedure is not discussed here since that program requires a certification that previous failures to comply were due to non-willful conduct. I.R.S. News Release IR-2014-73 (June 18, 2014), <https://www.irs.gov/newsroom/irs-makes-changes-to-offshore-programs-revisions-ease-burden-and-help-more-taxpayers-come-into-compliance> [<https://perma.cc/8RJZ-NESF>]. In addition, “quiet disclosure” is not discussed since it subjects participants to civil or criminal penalties. See *Closing the 2014 OVDP*, *supra* note 41 (describing quiet disclosures at FAQ 8).

⁵³ Oei, *supra* note 6, at 689–90 (explaining that the United States has been able to gather information about additional offenders by using information collected by virtue of its offshore voluntary disclosure programs or through what is termed “cascading compliance”).

⁵⁴ See Swanson, *supra* note 7.

⁵⁵ See, e.g., Fred L. Abrams, *Divorce & Hidden Money: Whistleblowing, Tax Fraud & Tipping the IRS*, ASSET SEARCH BLOG (Feb. 13, 2014), <http://www.assetsearchblog.com/2014/02/13/divorce-hidden-money-whistleblowingtax-fraud-tipping-the-irs/> [<https://perma.cc/3YEW-AS7L>] (recounting a divorce lawyer’s investigation into a husband suspected of hiding assets offshore); Jim Zarroli, *Want to Set Up a Shell Corporation to Hide Your Millions? No Problem*, NPR (Apr. 13, 2016), <https://www.npr.org/2016/04/13/474101127/want-to-set-up-a-shell-corporation-to-hide-your-millions-no-problem> [<https://perma.cc/4ZLR-8PGR>].

⁵⁶ Swanson, *supra* note 7. See generally Zarroli, *supra* note 55 (“The ease with which [shell companies] can be established is one reason more and more money is pouring into them each year.”).

in the sham corporation and then later lost.⁵⁷ At the same time, the wealthy spouse does not report the offshore account to the IRS, as required under the FBAR⁵⁸ and Foreign Account Tax Compliance Act of 2010 (FATCA)⁵⁹ filing requirements and engages in tax evasion.⁶⁰ For purposes of this Article, such spouses are included in the term “noncompliant” spouses.

⁵⁷ *Id.*

⁵⁸ 31 C.F.R. § 1010.350 (2018); DEP’T OF THE TREASURY, FORM TD F 90-22.1, REPORT OF FOREIGN BANK AND FINANCIAL ACCOUNTS (2012). U.S. persons with an interest or signatory authority over a foreign bank or financial account exceeding \$10,000 at any point during the year are required to file the FBAR electronically. *See BSA E-Filing System*, FIN. CRIMES ENF’T NETWORK, <https://bsaefiling.fincen.treas.gov/main.html> [<https://perma.cc/ZB7U-GLUK>].

⁵⁹ Foreign Account Tax Compliance Act, Pub. L. No. 111-147, 124 Stat. 72 (2010) (codified as amended at I.R.C. §§ 1471–1474 (2012)).

⁶⁰ I.R.S. News Release IR-2015-86 (June 10, 2015), <https://www.irs.gov/newsroom/tax-payers-with-foreign-assets-may-have-fbar-and-fatca-filing-requirements-in-june> [<https://perma.cc/DBF8-VBRF>] [hereinafter IRS, “Taxpayers with Foreign Assets” News Release]; Steven Toscher & Michel R. Stein, *FBAR Enforcement Is Coming!*, 5 J. TAX PRAC. & PROC. 27, 29 (2003); Joanna Heiberg, Note, *FATCA: Toward a Multilateral Automatic Information Reporting Regime*, 69 WASH. & LEE L. REV. 1685, 1698–99 (2012). For purposes of this Article, voluntary disclosure also encompasses the delinquent FBAR submission procedures and the delinquent international information return submission procedures, which will remain open after the 2014 OVDP temporarily closes on September 28, 2018. *Closing the 2014 OVDP*, *supra* note 41. Taxpayers who do not need “to file delinquent or amended tax returns to report and pay additional tax,” contrary to those using the OVDP or the Streamlined Filing Compliance Procedures, may use the submission procedures noted provided they meet certain requirements. *Delinquent FBAR Submission Procedures*, INTERNAL REVENUE SERV., <https://www.irs.gov/individuals/international-taxpayers/delinquent-fbar-submission-procedures> [<https://perma.cc/8PCY-MZVJ>] (last updated July 18, 2018) (explaining that taxpayers are eligible if they “have not filed a required . . . [FBAR], are not under a civil examination or criminal investigation by the IRS, and have not already been contacted by the IRS about the delinquent FBARs”); *Delinquent International Information Return Submission Procedures*, INTERNAL REVENUE SERV., <https://www.irs.gov/individuals/international-taxpayers/delinquent-international-information-return-submission-procedures> [<https://perma.cc/DMH9-5YS3>] (last updated June 18, 2018) (explaining that taxpayers are eligible if they “have not filed one or more required international information returns, have reasonable cause for not timely filing the information returns, are not under a civil examination or a criminal investigation by the IRS, and have not already been contacted by the IRS about the delinquent information returns”). Notably, the IRS criminal investigation voluntary disclosure program will remain open after September 28, 2018 as well. I.R.S. News Release IR-2018-52 (Mar. 13, 2018), <https://www.irs.gov/newsroom/irs-to-end-offshore-voluntary-disclosure-program-taxpayers-with-undisclosed-foreign-assets-urged-to-come-forward-now> [<https://perma.cc/2W24-UJYM>].

1. Family Law Discovery Process and Tracing Offshore Assets

Generally, family lawyers attempt to use the discovery process, where documents must be exchanged by court order, to gather financial and other information.⁶¹ Although some hidden foreign assets are uncovered through an extensive court discovery process, the process inevitably is incomplete.⁶² A family lawyer often must resort to filing motions to compel.⁶³ Even in responding to these motions to compel, a truly recalcitrant spouse will continue to fail to disclose assets and provide incomplete or inaccurate information.⁶⁴ Ultimately, the family lawyer must subpoena financial documents of any known bank or other financial accounts.⁶⁵

After obtaining documents through a subpoena, or less likely cooperation from the noncompliant spouse, a family lawyer conducts a review to determine whether any assets have mysteriously disappeared.⁶⁶ Generally, the other spouse must resort to hiring one or more forensic accountants that will trace assets and liabilities in order to uncover hidden offshore assets.⁶⁷ Forensic accountants also rely on document review to conduct such tracing.⁶⁸ In fact, it is not uncommon to learn there are 100 people in twenty countries delving into a secret world of offshore intricacies accessible only to the wealthiest

⁶¹ See 2 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 29.04 (2005) (first quoting *Ronnkvist v. Ronnkvist*, 331 N.W.2d 764, 765–66 (Minn. 1983) (“[P]arties to a marital dissolution proceeding have a duty to make a full and accurate disclosure of all assets and liabilities to facilitate the trial court’s property distribution.”) and then quoting *Rothman v. Rothman*, 320 A.2d 496, 503–04 (N.J. 1974) (stating that the trial judge must insist upon “full cooperation of the litigants” in a divorce proceeding to effectuate equitable distribution of marital property) (explaining that almost every equitable distribution and community property state recognizes the need for financial discovery)).

⁶² See *id.* § 29.04[2] (noting that the initial step is document disclosure and that a single demand may not be adequate).

⁶³ See RICE & RICE, *supra* note 48, at 306.

⁶⁴ See Darlys S. Harmon-Vaught, *Techniques for Discovering Hidden Assets and Unreported Income During the Divorce Process*, ASS’N DIVORCE FIN. PLANNERS (June 15, 2014), <https://www.divorceandfinance.org/news/284737/Techniques-for-Discovering-Hidden-Assets-and-Unreported-Income-During-the-Divorce-Process.htm> [<https://perma.cc/82VH-574S>] (addressing the large cost of investigation). See generally BARSON, *supra* note 48 (providing an overview of forensic accounting).

⁶⁵ *Id.*

⁶⁶ Marlene Moses & Beth A. Townsend, *Family Matters: Uncovering Hidden Assets in Divorce*, 48 TENN. B.J. 25, 26 (2012).

⁶⁷ See generally Brigitte W. Muehlmann et al., *The Use of Forensic Accounting Experts in Tax Cases as Identified in Court Opinions*, 4 J. FORENSIC & INVESTIGATIVE ACCT., no. 2, 2012, at 1 (analyzing the use of forensic accounting experts in federal and state courts).

⁶⁸ See Andrew S. Grossman, *Avoiding Legal Malpractice in Family Law Cases: The Dangers of Not Engaging in Financial Discovery*, 33 FAM. L.Q. 361, 376 (1999); Rebecca E. Hatch, *Uncovering Marital Assets in Divorce Proceedings*, 128 AM. JUR. TRIALS § 33 (2013).

individuals.⁶⁹ Their main objective is to unravel a web of company ownership that leads back to the wealthy instigator of it all, i.e., the beneficial owner.⁷⁰ Their work is frustrated by noncompliant spouses who refuse to turn over documents or financial information. The requests for these documents are often ignored or completed only partially.⁷¹

After the noncompliant spouse's hidden assets are uncovered in the family law setting, the assets become subject to tax related penalties, which include criminal liability or civil penalties.⁷² Although the other spouse may qualify for innocent spouse relief in theory, there are substantial roadblocks under the current provisions, which are discussed in Part II.⁷³

2. Current Tax Consequences of Noncompliant Spouses

Once hidden assets are disclosed during divorce proceedings, the most important issue in the tax context becomes whether a noncompliant spouse "willfully" failed to report their foreign assets.⁷⁴ This is because a willful failure could result in criminal prosecution or enormous civil penalties as discussed more fully in this section.⁷⁵ Moreover, new reporting laws, such as FATCA, require foreign financial institutions (FFIs) around the globe to report bank accounts held by U.S. customers to the IRS.⁷⁶ While these new reporting laws make it easier for the IRS, creditors, and spouses to find hidden foreign accounts, strengthening the consequences of failing to comply with these tax reporting laws and requirements in the context of divorce proceedings would result in more timely and accurate disclosure as well as locating additional offenders.⁷⁷

Currently, even after hidden foreign assets have come to light during divorce proceedings, there are too many ways for a noncompliant spouse to mitigate the tax consequences of their bad behavior. Most importantly, the IRS will rely on voluntary disclosure in determining whether to criminally

⁶⁹ Swanson, *supra* note 7.

⁷⁰ *Id.*

⁷¹ See Moses & Townsend, *supra* note 66, at 27–28. See generally Samuel V. Schoonmaker, III et al., *Hauling Foreign Assets and Income into U.S. Courts*, 15 FAM. ADVOC. 46 (1993) (describing the difficulties associated with discovering assets hidden abroad); Sanjay T. Tailor, *Better Civil Practice in Dissolution of Marriage Litigation*, 40 LOY. U. CHI. L.J. 911 (2009) (discussing the difficulty of discovery during the divorce process).

⁷² See *infra* notes 98–101 and accompanying text.

⁷³ Skarlatos & Sardar, *supra* note 45, at 108; see *infra* Part II.

⁷⁴ See I.R.C. § 7201 (2012).

⁷⁵ See *infra* notes 98–101 and accompanying text.

⁷⁶ FATCA, enacted in 2010 as part of the HIRE Act requires U.S. persons to report specified foreign assets to the IRS on Form 8938 pursuant to I.R.C. § 6038D and FFIs to report U.S. customers to the IRS. See I.R.C. §§ 1471–1474.

⁷⁷ See Oei, *supra* note 6, at 731–32.

prosecute.⁷⁸ Voluntary disclosure takes place when in a manner that is truthful, timely, and complete, the taxpayer (a) evinces a willingness to cooperate followed by such cooperation with the IRS to determine accurate tax liability and (b) engages in a good faith effort to satisfy in full applicable tax, interest, and penalties.⁷⁹ Often, as stated above, the noncompliant spouse never chooses to reveal these assets. They are only uncovered through a family lawyer's use of motions to compel and subpoenas and through the hiring of forensic accountants.⁸⁰ Once tax fraud is apparent in divorce proceedings, the judge may report the fraud to the IRS.⁸¹ In a 2004 New York case, for example, a judge reported a husband to the IRS after an admission that he had not paid taxes.⁸²

However, a spouse who has remained noncompliant over the course of several years of divorce proceedings will only be subject to criminal prosecution or to civil penalties if willfulness is shown.⁸³ Currently, the discovery process enables noncompliant spouses to claim their failure to report hidden foreign assets was not willful.⁸⁴ This Article proposes that discovery documents should include statements of reporting requirements to prevent a noncompliant spouse from getting away with tax fraud with little or no ramifications. In addition, such noncompliant spouses are still eligible to participate in voluntary disclosure programs⁸⁵ or delinquent FBAR procedures and delinquent international information return procedures.⁸⁶ This Article contends that family lawyers should be able to report noncompliant spouses who meet certain thresholds to the IRS so that they will become ineligible for pre-clearance for voluntary

⁷⁸ See IRM 9.5.11.9(1) (Dec. 2, 2009).

⁷⁹ See IRM 9.5.11.9(3). For the requirements applicable for the delinquent FBAR and international information return submission procedures, see *supra* note 60.

⁸⁰ See *supra* notes 54–73 and accompanying text.

⁸¹ Abrams, *supra* note 59.

⁸² See *Hashimoto v. De La Rosa*, No. 350155/04, 2004 WL 2187595, at *4 (N.Y. Sup. Ct. June 23, 2004); see also *Beth M. v. Joseph M.*, 203398/2001, 2006 WL 2128157, at *15 n.4 (N.Y. Sup. Ct. July 25, 2006) (stating that husband was reported to IRS after admitting he failed to file tax returns for 1997–2001 and other years).

⁸³ See *Spies v. United States*, 317 U.S. 492, 499–500 (1943) (holding that willfulness requires a specific intent or active desire to engage in tax evasion); see also *United States v. Ragen*, 314 U.S. 513, 513 (1942) (holding that tax evasion conviction requires proof that defendant acted willfully); *Elwert v. United States*, 231 F.2d 928, 932–33 (9th Cir. 1956) (stating taxpayer's acting with specific intent to defraud must be shown).

⁸⁴ See Skarlatos & Sardar, *supra* note 45.

⁸⁵ See *Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2012*, INTERNAL REVENUE SERV., <https://www.irs.gov/individuals/international-taxpayers/offshore-voluntary-disclosure-program-frequently-asked-questions-and-answers> [<https://perma.cc/BY3J-EZL7>] (describing eligible participants for voluntary disclosure at FAQ 12).

⁸⁶ See *supra* note 60 (stating that voluntary disclosure is deemed to include delinquent FBAR and international information return submission procedures for purposes of this Article).

disclosure programs.⁸⁷ The following section briefly outlines the reporting requirements for foreign assets that a noncompliant spouse would have failed to fulfill during the divorce proceedings and likely in prior years.

3. Offshore Reporting Requirements

Since the United States has a worldwide system of taxation for individuals, all U.S. citizens and residents are required to report worldwide income, regardless of whether such income is earned abroad.⁸⁸ U.S. taxpayers may use a foreign tax credit or a foreign income exclusion to prevent double taxation largely.⁸⁹ Moreover, U.S. taxpayers have a legal duty to report their ownership interest in foreign assets, e.g., foreign accounts and foreign entities, such as corporations, partnerships, and trusts.⁹⁰ Finally, under a separate reporting obligation, U.S. taxpayers are required to file a FBAR with the Treasury Department for each foreign financial account that has a balance over \$10,000 at any time during the taxable year.⁹¹ An unreported foreign account may result in the imposition of huge penalties that may far exceed the value of the unreported account.⁹² Foreign asset reporting obligations are complex and require reporting the same foreign asset in multiple ways at times.⁹³ To summarize, all foreign income and the majority of foreign assets must be reported in the United States even if earned or kept abroad.⁹⁴ There are three

⁸⁷ A taxpayer can become ineligible for the OVDP if the IRS receives information pertinent to their undisclosed OVDP assets while a hypothetical question (e.g., from his/her attorney) is pending. See *Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2012*, *supra* note 85 (FAQ 22).

⁸⁸ I.R.C. § 61 (2012); *Cook v. Tait*, 265 U.S. 47, 56 (1924); Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. 169, 172 (2016).

⁸⁹ I.R.C. §§ 901, 911.

⁹⁰ See, e.g., INTERNAL REVENUE SERV., SCHEDULE B (FORM 1040): INTEREST AND ORDINARY DIVIDENDS (2018); INTERNAL REVENUE SERV., FORM 5471: INFORMATION RETURN OF U.S. PERSONS WITH RESPECT TO CERTAIN FOREIGN CORPORATIONS (2018); INTERNAL REVENUE SERV., FORM 3520: ANNUAL RETURN TO REPORT TRANSACTIONS WITH FOREIGN TRUSTS AND RECEIPT OF CERTAIN FOREIGN GIFTS (2018); INTERNAL REVENUE SERV., FORM 3520-A: ANNUAL INFORMATION RETURN OF FOREIGN TRUST WITH A U.S. OWNER (2018); INTERNAL REVENUE SERV., FORM 8865: RETURN OF U.S. PERSONS WITH RESPECT TO CERTAIN FOREIGN PARTNERSHIPS (2018); INTERNAL REVENUE SERV., FORM 8938: STATEMENT OF SPECIFIED FOREIGN FINANCIAL ASSETS (2018).

⁹¹ See 31 U.S.C. § 5314 (2012); 31 C.F.R. § 1010.350 (2012). The FBAR is filed on Form 114 with the Financial Crimes Enforcement Network (FinCEN), a division of the Treasury Department. IRS, "Taxpayers with Foreign Assets" News Release, *supra* note 60.

⁹² Skarlatos & Sardar, *supra* note 45, at 103.

⁹³ *Id.* at 85.

⁹⁴ *Id.* For a complete discussion of the tax return reporting requirements and related penalties, see *id.* at 85–93.

possible categories of consequence for failure to comply: (1) criminal conviction;⁹⁵ (2) a 50% FBAR penalty;⁹⁶ and (3) a 75% civil tax fraud penalty.⁹⁷

B. Willful Violation Equals Three Possible Penalties

Once an IRS agent, a prosecutor, or a court determines that a noncompliant spouse has acted willfully in failing to meet reporting requirements, the spouse is subject to criminal prosecution or enormous tax and FBAR penalties.⁹⁸ In fact, willfulness is the standard for all three categories of penalties to which a noncompliant spouse may be subject: (1) criminal conviction;⁹⁹ (2) a 50% FBAR penalty;¹⁰⁰ and (3) a 75% civil tax fraud penalty.¹⁰¹ As a result, proving willfulness is the key to strengthening the implications of failure to comply with reporting requirements.¹⁰² Although the Department of Justice's Offshore Compliance Initiative (OCI) has been advertised as a top litigation priority of the Tax Division, as of July 2016, it has only resulted in indictments of 117 taxpayers with offshore accounts and nineteen guilty verdicts overall according to one tax blog.¹⁰³

⁹⁵ I.R.C. § 7201 (2012).

⁹⁶ If a taxpayer can prove reasonable cause for failing to file an FBAR, e.g., the taxpayer told a tax preparer who neglected to file the FBAR about the foreign account(s), no penalty will be imposed. See IRM § 4.26.16.4.11 (Nov. 6, 2015). However, if the taxpayer cannot prove reasonable cause for failing to file an FBAR, a non-willful violation of the FBAR reporting requirement may result in a civil penalty up to \$10,000 if it occurred after October 22, 2004. 31 U.S.C. § 5321(a)(5)(B) (2012); see also Matthew A. Melone, *Penalties for the Failure to Report Foreign Financial Accounts and the Excessive Fines Clause of the Eighth Amendment*, 22 GEO. MASON L. REV. 337, 346, 358 (2015).

⁹⁷ See I.R.C. § 6663(a); 1 ROBERT S. FINK ET AL., TAX CONTROVERSIES: AUDITS, INVESTIGATIONS, TRIALS § 17.03 (Lexis/Nexis, 35th ed., 2016); *Offshore Credit Card Accounts Are Sometimes Financial Accounts for Foreign Bank and Financial Accounts Reporting*, 20 J. TAX'N & REG. FIN. INST. 38 (2006).

⁹⁸ See INTERNAL REVENUE SERV., TAX CRIMES HANDBOOK 2 (2009), https://www.irs.gov/pub/irs-utl/tax_crimes_handbook.pdf [<https://perma.cc/LJE9-WF4D>] [hereinafter TAX CRIMES HANDBOOK].

⁹⁹ Regarding criminal conviction, the government must show the taxpayer willfully failed to report a foreign asset. Skarlatos & Sardar, *supra* note 45, at 93; see also Spies v. United States, 317 U.S. 492, 497 (1942).

¹⁰⁰ See 31 U.S.C. § 5321(a)(5)(B); IRM § 4.26.16.4.11.

¹⁰¹ Regarding the 75% penalty, the government must show the taxpayer willfully under-reported his/her income tax. See *supra* note 82; see also Skarlatos & Sardar, *supra* note 45, at 93.

¹⁰² See, e.g., Sansone v. United States, 380 U.S. 343, 353 (1965) ("Given petitioner's material misstatement which resulted in a tax deficiency, if, as the jury obviously found, petitioner's act was willful in the sense that he knew that he should have reported more income than he did for the year 1957, he was guilty of violating both §§ 7201 and 7207. If his action was not willful, he was guilty of violating neither.").

¹⁰³ Jack Townsend, *Offshore Charges: Convictions Spreadsheet*, FED. TAX CRIMES (July 22, 2016), <http://federaltaxcrimes.blogspot.com/p/offshore-charges-convictions.html> [<https://perma.cc/8U8C-BBX6>].

The only difference in terms of the willfulness standard that applies to each penalty category is the level of proof required. For a criminal conviction, the level of proof is “beyond a reasonable doubt” whereas for the civil FBAR or civil fraud penalty cases, the level of proof is “clear and convincing.”¹⁰⁴ If the government has large amounts of evidence that the taxpayer acted willfully in failing to report a foreign asset, it will have an easier time meeting the higher burden of showing willfulness “beyond a reasonable doubt.”¹⁰⁵ However, if the government does not have much evidence of willfulness or the taxpayer is able to offer cogent excuses, then the government may only be able to meet the “clear and convincing” standard of proof and will not be able to seek a criminal charge.¹⁰⁶

C. Using Family Law Discovery Devices to Prove Willfulness

There are a number of factors that establish willfulness, and the devices used in the divorce discovery process should be modified to make proving willfulness easier.¹⁰⁷ The definition of willfulness is “an intentional violation of a known legal duty.”¹⁰⁸ A taxpayer who knows they should report a foreign asset, but intentionally refuses to do so, has acted willfully.¹⁰⁹ The problem is that ignorance of the law may be used as a defense in this context.¹¹⁰ In other words, a taxpayer may claim that he or she did not know there was a legal requirement to disclose a foreign asset, and as a result, willfulness cannot be proven.¹¹¹

In light of the definition for willfulness, the discovery process should embody informing a noncompliant spouse of the legal duty to disclose foreign assets through complying with offshore reporting requirements. Once a noncompliant spouse has provable knowledge of offshore reporting requirements, if the other spouse still refuses to comply, willfulness would be easily established by the government.¹¹² At that point, the noncompliant spouse

¹⁰⁴ Steven Toscher & Lacey Strachan, *Proving Willfulness in an FBAR Case*, 14 J. TAX PRAC. & PROC. 29, 29 (2012).

¹⁰⁵ See Skarlatos & Sardar, *supra* note 45, at 94.

¹⁰⁶ See *id.*

¹⁰⁷ The concept of “willful blindness” also applies to “willfulness.” However, this standard is more difficult to prove since it involves conjecture about a person’s thoughts when the tax return was filed. *Id.* at 94–95. Accordingly, this Article will focus upon imputing knowledge to the noncompliant spouse so that the government’s burden of proof required for establishing willfulness may be met more easily.

¹⁰⁸ Criminal tax offenses are specific intent crimes. The intent required is “willfulness,” i.e., an “intentional violation of a known legal duty.” *Cheek v. United States*, 498 U.S. 192, 196 (1991); *United States v. Pomponio*, 429 U.S. 10, 22 (1976).

¹⁰⁹ A willful failure to file requires a failure that is voluntary, purposeful, deliberate, and intentional, as distinct from merely accidental, inadvertent, or negligent. *Sawyer v. United States*, 607 F.2d 1190, 1192 (7th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980).

¹¹⁰ *Cheek*, 498 U.S. at 199–200.

¹¹¹ See *id.*

¹¹² See *id.* at 202.

would have intentionally violated a known legal duty, which is the very definition of willfulness.¹¹³

1. *Imputing Knowledge Through Discovery Devices*

There are several discovery devices that could be used to impute knowledge to a noncompliant spouse and thus help the government meet its burden of proof in showing a willful violation. As stated earlier, noncompliant spouses are able to claim a lack of knowledge of reporting requirements after having been served with numerous requests for financial documents during the divorce discovery process.¹¹⁴ As discussed earlier, family lawyers often must rely on subpoenas, motions to compel, and the work of forensic accountants to gain a full picture of assets, especially those that have been hidden offshore in anticipation of divorce.¹¹⁵ Only through the expenditure of much time and money are the hidden assets brought to light.¹¹⁶ The noncompliant spouse who has refused to disclose assets at every turn can escape both criminal liability and civil penalties, which require a showing of willfulness, simply by claiming they had no knowledge of reporting requirements.

This stark reality begs an important question: Why not include in discovery requests statements that will impute knowledge of reporting requirements to such noncompliant spouses? Following is a discussion of how certain discovery devices, namely (1) interrogatories, (2) requests for production of documents, and (3) depositions could be used in this manner and thus alleviate the government's burden in proving willfulness in a criminal prosecution or in assessing civil penalties.¹¹⁷ The threat of successful criminal prosecution or the imposition of huge civil penalties should encourage noncompliant spouses to comply with discovery and reveal hidden assets to the tax authorities.¹¹⁸

First, interrogatories may be used to impute knowledge of the legal duty to report hidden foreign assets to the IRS. Interrogatories are written questions sent to a party (the "answering party") that are responded to in writing under oath and then remitted to the sender.¹¹⁹ Interrogatories may require the answering party to provide "papers, documents or photographs" that are relevant in responding.¹²⁰ Interrogatories should include a straightforward statement of the

¹¹³ See *id.* at 201.

¹¹⁴ See *supra* Part I.A.2.

¹¹⁵ See *supra* Part I.A.1.

¹¹⁶ Harmon-Vaught, *supra* note 64 (discussing methods for uncovering hidden assets that can "present a seemingly insurmountable wall" of difficulty for those trying to foil them).

¹¹⁷ See VALUATION AND DISTRIBUTION OF MARITAL PROPERTY, *supra* note 61, § 29.04[6] (listing, in addition to an initial document demand, other appraisal devices, including oral depositions and interrogatories).

¹¹⁸ See Abrams, *supra* note 55.

¹¹⁹ Hatch, *supra* note 68, § 36.

¹²⁰ *Id.* § 34.

legal duty to report hidden foreign assets to the IRS by reference to specific forms and schedules. Once the answering party is served with the interrogatories, the party has knowledge of such legal duty. If the answering party is a noncompliant spouse, the government can easily meet its burden of proving willfulness and subsequently seek criminal prosecution.¹²¹ A warning to that effect could also be included with the interrogatories. This would incentivize potential noncompliant spouses to disclose hidden foreign assets both to the IRS and to their spouse.

Second, requests for production of documents may be used in a similar manner to provide inescapable knowledge of the legal duty to disclose hidden foreign assets. After a family law action commences, a party may request documents or other items in the possession, custody, or control of the other party or a person served with a notice or subpoena.¹²² This is referred to as a request for production of documents.¹²³ Noncompliant spouses refuse to comply with these requests, which leads to unnecessary prolonging of the divorce proceedings.¹²⁴ At the same time, noncompliant spouses also fail to disclose information ascertainable from the documents they are hiding to the IRS in violation of reporting requirements. The noncompliant spouse “willfully” abuses the discovery process and should also be deemed to “willfully” violate IRS reporting obligations.¹²⁵ To achieve a more fair result, requests for production of documents, as with interrogatories, should include a statement of reporting requirements that references specific forms and schedules.¹²⁶

Third, depositions, which involve oral examination of a party, also serve as a keen opportunity to impute knowledge that in turn will make willfulness easier to prove.¹²⁷ A deposition notice may also include the requirement of producing documents or other items at the oral examination.¹²⁸ Documents turned over during the deposition may be marked as exhibits and used during the examination.¹²⁹ However, typically, financial documents are requested before the taking of the deposition.¹³⁰ The family lawyer taking the deposition of a noncompliant spouse (who has refused to provide documents) could begin the

¹²¹ See *Cheek v. United States*, 498 U.S. 192, 196 (1990).

¹²² Hatch, *supra* note 68, § 34.

¹²³ *Id.*

¹²⁴ See Aaron Thomas, *When Your Spouse Won't Provide Financial Information: Motion to Compel Divorce Discovery*, LAWYERS.COM, <https://www.lawyers.com/legal-info/family-law/divorce/when-your-spouse-wont-provide-financial-information-motion-to-compel-divorce-discovery.html> [<https://perma.cc/U4DY-V6SM>].

¹²⁵ See, e.g., CAL. CIV. PROC. CODE 2023.010(g), 2023.030(d) (West 2007); see also *In re Marriage of Eustice*, 195 Cal. Rptr. 3d 876, 889 (Cal. Ct. App. 2015) (noting that ex-husband engaged in “willful discovery abuse” by refusing to produce discovery documents for over two and a half years which resulted in the unavailability of material evidence).

¹²⁶ See *supra* text accompanying notes 58–60.

¹²⁷ Hatch, *supra* note 68, § 38.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See RICE & RICE, *supra* note 48, at 389.

deposition by reading a short uniform statement of reporting requirements.¹³¹ Since depositions are transcribed by a stenographer,¹³² a deposition transcript could be given to the government to enable it to meet its burden of proof in a criminal prosecution once the compliant spouse is able to determine some of the hidden assets through other means, i.e., has impeached statements made during the deposition.¹³³

2. Willfulness in the FBAR Context

An examination of how courts have recently analyzed willfulness in the FBAR context bolsters the argument presented. In *United States v. Williams*,¹³⁴ the Fourth Circuit reversed the lower court's ruling and held that the taxpayer did in fact willfully fail to file FBARs, which resulted in the imposition of FBAR civil penalties.¹³⁵ In making its decision, the Circuit Court relied on three principles, the first of which is particularly relevant for these purposes: conduct designed to conceal income or additional financial information can establish willfulness.¹³⁶ Regarding this principle, the Court noted that the taxpayer stated on a tax return worksheet from his accountant that he did not have a foreign bank account.¹³⁷ The Court determined this was evidence of conduct designed to conceal income and used it to impose FBAR penalties against him.¹³⁸

More than likely, obtaining a tax return worksheet from a noncompliant spouse would be a difficult task and probably require a subpoena of the tax accountant. Also, the Court had to rely heavily upon Williams' guilty plea, i.e., admission that he failed to report foreign accounts to the IRS or the Treasury Department as part of an intricate tax scheme.¹³⁹ Requiring a guilty plea to establish willfulness restricts the ability of courts to impose civil FBAR penalties and is more than likely not a common occurrence.¹⁴⁰ A noncompliant spouse's refusal to turn over information regarding foreign assets should already

¹³¹ Cf. *id.* at 303 (explaining that reading the perjury statute at the beginning of the deposition and the penalty for perjury is an effective technique for obtaining more truthful depositions).

¹³² See *id.* at 393.

¹³³ See TAX CRIMES HANDBOOK, *supra* note 98, at 9.

¹³⁴ *United States v. Williams*, 489 F. App'x 655 (4th Cir. 2012).

¹³⁵ *Id.* at 659–60.

¹³⁶ See *id.*

¹³⁷ *Id.*; see also Aruna Viswanatha et al., *Manafort Accountant Testifies Tax Returns Contained False Information*, WALL ST. J. (Aug. 3, 2018), <https://www.wsj.com/articles/manafort-overseas-funds-unknown-to-his-accountant-1533321158> [<https://perma.cc/XU8B-LLBA>] (recounting that accountants for Paul Manafort testified that he provided false information and repeatedly denied having foreign bank accounts).

¹³⁸ *Williams*, 489 F. App'x at 659–60.

¹³⁹ *Id.*

¹⁴⁰ See Robert Hanson, *Willful "Blindness" and Willful FBAR Penalties* (Mar. 1, 2017), <https://www.irsmedic.com/blog/2017/03/the-2017-state-of-the-law-on-willful-fbar-penalties.html> [<https://perma.cc/95R4-9DKG>].

be deemed evidence of conduct designed to conceal income.¹⁴¹ A more direct way of establishing a noncompliant spouse's willfulness in the FBAR context would be to include statements of foreign asset/income reporting requirements on the discovery devices mentioned.

In cases involving a noncompliant spouse, the government should be able to point to the noncompliant spouse's behavior during discovery to establish willfulness instead of having to rely on finding a tax worksheet given to an accountant and a guilty plea. A noncompliant spouse's behavior by its nature is conduct designed to conceal income.¹⁴² That is why motions to compel and subpoenas must be used to obtain any documents; even in the face of motions to compel and subpoenas, noncompliant spouses persist on concealing their income, which should satisfy the standard set forth in *Williams*. However, to make the willfulness even clearer, the discovery devices should include statements of reporting requirements. Including such statements of reporting requirements would make it even easier for the government to prove that a noncompliant spouse has acted willfully in failing to report hidden foreign assets. The government need only point to the statements of reporting requirements contained in the interrogatories, requests for documents, etc. The noncompliant spouse's decision to ignore written statements of reporting requirements contained in discovery requests would enable the government to show willfulness and thus impose civil FBAR penalties under *Williams*.

In another case that resulted in the imposition of FBAR penalties, *United States v. McBride*,¹⁴³ the taxpayer was held to have willfully failed to file FBARs due to certain egregious actions, including describing his offshore structuring as tax evasion himself.¹⁴⁴ Because McBride had signed his income tax returns, knowledge of the FBAR reporting requirement was imputed to him.¹⁴⁵ However, his failure to comply with the legal duty to file the FBAR was deemed either "reckless or due to willful blindness."¹⁴⁶ The court then had to find that recklessness is adequate to show willfulness in terms of imposing a civil FBAR penalty.¹⁴⁷ If a court is not willing to make the same determination regarding "willfulness," a noncompliant spouse could escape civil FBAR penalties and escape any meaningful financial consequences despite his/her deliberate concealing of assets over the course of a multi-year divorce

¹⁴¹ See *Spies v. United States*, 317 U.S. 492, 499 (1942) (noting that conduct likely to conceal or mislead constitutes an affirmative act of evasion, and in contrast to a passive failure to file, may serve as the basis a tax evasion conviction); see also *United States v. Williams*, 489 F. App'x 655, 659 (4th Cir. 2012) (finding that false answers regarding tax documents are "meant to conceal or mislead sources of income" and constitute willful blindness to FBAR requirements).

¹⁴² See *supra* Part I.C.

¹⁴³ *United States v. McBride*, 908 F. Supp. 2d 1186 (D. Utah 2012).

¹⁴⁴ *Id.* at 1206.

¹⁴⁵ See *id.* at 1212–13, 1214.

¹⁴⁶ See *id.* at 1212–13.

¹⁴⁷ *Id.* at 1204–05.

proceeding. A better course of action is to include statements of reporting requirements in discovery devices and impute to the noncompliant spouse knowledge of such requirements. Although *Williams* and *McBride* deal with willfulness in the FBAR civil penalty context, there is no reason why willfulness could not be proven beyond a reasonable doubt, the standard required for criminal prosecution. The potential exposure to criminal liability should serve as a deterrent to a continued failure to cooperate with the discovery process and to continue to violate reporting requirements throughout divorce proceedings.¹⁴⁸

D. Removing the Possibility of Voluntary Disclosure for Noncompliant Spouses

A taxpayer who has failed to disclose foreign assets may participate in what is known as a voluntary disclosure program in order to escape criminal liability and to prevent at least some civil penalties.¹⁴⁹ There are four requirements for participation in the offshore voluntary disclosure program: (1) a “timely” disclosure; (2) undisclosed income or assets that were legally derived; (3) truthful cooperation with requests for information; and (4) payment or a good faith arrangement to pay taxes, penalties, and interest owing.¹⁵⁰ The first two requirements are threshold requirements.¹⁵¹ This Article assumes that the offshore assets have been legally derived.

1. Current Pre-Clearance Procedure

“Timely” means that the noncompliant spouse is not already subject to an IRS investigation or audit.¹⁵² If the IRS has already started an investigation or audit, the noncompliant spouse is ineligible for the voluntary disclosure program.¹⁵³ A “pre-clearance” procedure enables taxpayers to determine whether there is an IRS investigation or audit underway before disclosing the unreported assets.¹⁵⁴ The taxpayer is required to send the IRS Criminal Investigation Division a letter identifying, inter alia, himself/herself and any financial institution that holds unreported assets.¹⁵⁵ The IRS then runs a check

¹⁴⁸ See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176 (1968) (“Practically all the diverse theories agree . . . an increase in a person’s probability of conviction or punishment if convicted would generally decrease, perhaps substantially, perhaps negligibly, the number of offenses he commits.”).

¹⁴⁹ Skarlatos & Sardar, *supra* note 45, at 103–06.

¹⁵⁰ See *Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2012*, *supra* note 85 (describing the program’s requirements at FAQ 7); Skarlatos & Sardar, *supra* note 45, at 103.

¹⁵¹ Skarlatos & Sardar, *supra* note 45, at 103–04.

¹⁵² IRM 9.5.11.9(4) (Dec. 2, 2009).

¹⁵³ See *id.*

¹⁵⁴ See *Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2012*, *supra* note 85 (discussing the preclearance procedure at FAQ 23).

¹⁵⁵ *Id.* (stating the required disclosures at FAQ 25).

against a list of taxpayers whom the IRS or the Department of Justice has previously identified and will then inform the taxpayer whether they are “pre-cleared” and therefore may make a disclosure.¹⁵⁶ In most cases, a noncompliant spouse would need to request pre-clearance before making a disclosure.¹⁵⁷

2. *Proposed Ineligibility for Pre-Clearance*

Instead of allowing noncompliant spouses an opportunity to enter a voluntary disclosure program after evading the discovery process for prolonged periods of time,¹⁵⁸ there should be a shortened window for these taxpayers. Once a motion to compel has been filed against a noncompliant spouse and has either remained pending for a given period, e.g., six months or longer or has been granted, and the other spouse can prove an offshore connection in the form of (1) at least one known foreign account (whether disclosed or not); (2) prior offshore business activity; or (3) frequent trips abroad, the noncompliant spouse’s name should be added to a separate list that makes them ineligible for the disclosure program if the noncompliant spouse does not make a disclosure within a prescribed time frame, e.g., ninety days. By giving the noncompliant spouse a deadline for starting the disclosure process that works in tandem with the discovery process timeline, the IRS can assist with the uncovering of hidden assets and promote compliance with reporting requirements, which ultimately will generate more revenue in the form of taxes, penalties, and interest from the noncompliant spouse and additional offenders.

Allowing a noncompliant spouse the opportunity to mitigate criminal liability and civil penalties easily through entering a voluntary disclosure program leads to an unjust result. The discovery process is unnecessarily prolonged, and accurate reporting is unnecessarily delayed by enabling noncompliant spouses to face only minor consequences for failing to comply. Such flagrant disregard of the family law discovery process and reporting requirements should not go unreprimanded. The solution is to add statements of reporting requirements to discovery devices to enable the government to prove willfulness and to allow family lawyers dealing with noncompliant spouses to have their names added to the list the IRS uses to determine ineligibility for voluntary disclosure pre-clearance. These two changes will serve as a powerful disincentive for continued noncompliance and will result in more expedient divorce proceedings and greater compliance with reporting requirements.

¹⁵⁶ See *id.*; Skarlatos & Sardar, *supra* note 45, at 103.

¹⁵⁷ See *Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2012*, *supra* note 45 (discussing the preclearance procedure for both spouses at FAQ 24.1).

¹⁵⁸ See Harmon-Vaught, *supra* note 64.

III. THE UNJUST DENIAL OF INNOCENT SPOUSE RELIEF FOR WIVES OF NONCOMPLIANT SPOUSES

The next step that must be confronted is what happens to the compliant spouse who has uncovered the hidden assets during the divorce process. Since joint and several liability attaches with the filing of joint tax returns, such spouse, typically the wife,¹⁵⁹ will also face the possibility of civil and criminal liability unless she obtains innocent spouse relief under section 6015.¹⁶⁰ The mismatch of requiring willfulness to criminally convict the noncompliant spouse while allowing mere “knowledge” of the receipt of income (not even the source) to eviscerate the ability of his wife to obtain federal innocent spouse relief leads to a perverse result. Our current law disincentivizes wives of noncompliant spouses from disclosing the offshore assets and accounts unearthed in dissolution proceedings through forensic accountants and investigative accounting.

Granted, there are two additional avenues that a wife in this circumstance could use, but neither is as complete and thus neither would incentivize whistleblowing. First, the wife could avail herself of other statutory relief provisions.¹⁶¹ However, these forms of relief generally involve an assessment of liability against the wife and a later acknowledgment of her inability to pay in full at the time.¹⁶² A wife would be unlikely to run the risk that the IRS would assess total tax liability to her and thus dissuaded from whistleblowing.¹⁶³ Second, a wife who is unable to receive federal mitigation could request that the other spouse contribute toward the tax liability and seek relief under state law.¹⁶⁴ Nevertheless, this is not a viable solution if the noncompliant husband is judgment proof, and a ruling on the state level could require her to pay.¹⁶⁵

Part II argues that the United States must provide wives of noncompliant spouses with at least federal innocent spouse relief to encourage them to whistle blow about offshore tax evasion uncovered during dissolution proceedings. It also concludes that this is in most cases an equitable result because such wives typically would not have participated in or known about the wrongdoing of their

¹⁵⁹ See *infra* Part II.B.1.

¹⁶⁰ I.R.C. § 6015 (2012).

¹⁶¹ These provisions include economic hardship, I.R.C. § 6343(a)(1)(D); Treas. Reg. § 301.6343-1(b)(4) (as amended in 2008), installment agreements, I.R.C. § 6159, offer-in-compromise, I.R.C. § 7122, and “currently not collectible designation,” I.R.C. § 6404(c). Also, there is a ten-year statute of limitations for the IRS to collect, which is in addition to the three-year statute of assessment period for the IRS to determine a deficiency. I.R.C. § 6502(a); Treas. Reg. § 301.6502-1(a) (2006).

¹⁶² See Stephanie Hunter McMahon, *What Innocent Spouse Relief Says About Wives and the Rest of Us*, 37 HARV. J.L. & GENDER 141, 147–53 (2014).

¹⁶³ See *id.* at 151 n.53 (“Wives sought relief in 85.4% of cases brought . . . and won 37.4% of their trials and 21.6% of subsequent appeals.”).

¹⁶⁴ See *infra* Part II.B.3 (discussing state law implications).

¹⁶⁵ See McMahon, *supra* note at 162, at 157.

spouses. Had they known of the unreported income, they would not have needed to hire forensic accountants to engage in investigative accounting.

First, it explains the problem of civil and criminal liability that attaches with the filing of a joint tax return. Second, it provides a summary of innocent spouse relief, with a particular focus on relief under section 6015(c), which is available for spouses no longer married, and under section 6015(f), the equitable relief provision. Third, it then addresses the current challenges facing wives of noncompliant spouses in obtaining such relief and examines relevant omitted income cases. Fourth, it argues that the legislative history of innocent spouse relief supports extending innocent spouse relief to wives of noncompliant spouses. Fifth, a reform of innocent spouse relief is proposed based upon new understandings of financial and other forms of domestic abuse relevant in this context. Finally, it addresses remaining issues associated with expanding relief.

A. Joint Civil and Criminal Liability

Couples often decide how to delegate the preparation of tax returns or what has been termed the duty to disclose.¹⁶⁶ As a result, even if a spouse deliberately conceals a failure to report income on a tax return, the other spouse may become liable for the resulting tax liability in full, including any penalties and interest, which could eclipse in size the original tax liability.¹⁶⁷

Even more distressingly, the other spouse, who was really a mere signatory, may be held criminally liable for tax and nontax offenses if a court finds the individual was “willfully blind” to omissions of income and fraudulent representations.¹⁶⁸ Pursuant to innocent spouse relief under I.R.C. § 6015, each spouse’s tax liability is allocated as though fictional separately filed individual returns had been filed.¹⁶⁹ However, the IRS may deny this relief if the spouse had actual knowledge of unreported income.¹⁷⁰

The threats of civil liability and criminal indictment for a wife of a noncompliant spouse are very real ones.¹⁷¹ In the case of civil liability, this threat never disappears due to an exception to the usual three-year statute of limitations period.¹⁷² However, there is no statute of limitations for assessing taxes in the case of false or fraudulent returns relating to tax evasion. That means

¹⁶⁶ David Gold-Kessler, *Assessing the Hazards to an “Innocent Spouse” of Civil and Criminal Liability for Tax Offenses in a Dissolution of Marriage Proceeding*, 25 J. AM. ACAD. MATRIM. L. 103, 103 (2012).

¹⁶⁷ See *id.* at 107–09.

¹⁶⁸ See, e.g., I.R.C. § 7201 (2012).

¹⁶⁹ *Id.* § 6015(d)(3)(A).

¹⁷⁰ See *Cheshire v. Commissioner*, 282 F.3d 326, 336 (5th Cir. 2002) (stating in the case of deductions, actual knowledge of the facts that caused the deduction not to be available bars relief).

¹⁷¹ Gold-Kessler, *supra* note 166, at 103 (observing “a spouse must tread very carefully” to avoid criminal liability).

¹⁷² See I.R.C. § 6501(c)(1). Typically, the IRS only has three years from the date a return was filed to assess additional taxes. *Id.*

a wife could be hit with an enormous tax liability at any time after the divorce, which leads to great uncertainty for her, particularly as the typical primary caregiver.

In the case of criminal indictment, such wives are subject to possible liability for six years after the filing of the false and/or fraudulent returns.¹⁷³ Each year that taxes were not paid constitutes a separate offense.¹⁷⁴ Moreover, a court may use the repeated omission of income to infer knowing, willful falsification of returns.¹⁷⁵ A taxpayer's good faith reliance upon the advice of a qualified accountant may serve as a defense but only if the accountant was informed of all relevant facts.¹⁷⁶ Accordingly, the passage of time may result in freedom from criminal prosecution; however, in the civil context it will lead to the compounding of interest on unpaid tax liability.¹⁷⁷

This is a reason for the noncompliant husband to use the offshore voluntary disclosure program. At least under regular voluntary disclosure, the reporting of previously unreported income and the satisfaction of any resulting tax liability will limit exposure to only civil penalties.¹⁷⁸ Although voluntary disclosure cannot guarantee a taxpayer will not face criminal prosecution,¹⁷⁹ it may help to avoid criminal sanctions provided certain conditions are satisfied.¹⁸⁰

B. *Innocent Spouse Relief and Its Inadequacies*

Simply stated, innocent spouse relief serves as an exception to the general rule that a husband and wife filing a joint return are jointly and severally liable for the taxes owed on such return.¹⁸¹ Once a compliant spouse finds hidden offshore assets, he or she will be confronted with the need for innocent spouse relief to escape the joint and several liability that attaches to all jointly filed tax returns.¹⁸² There are three types of innocent spouse relief under I.R.C. § 6015: (1) an election under section 6015(b) for taxpayers still married; (2) an election under section 6015(c) for taxpayers separated or divorced whereby the innocent

¹⁷³ I.R.C. § 6531 (2012). In terms of criminal liability, the government has six years from the date of the offense to issue a criminal indictment for tax evasion, failure to pay taxes, or filing a false return. *Id.*

¹⁷⁴ *United States v. Smith*, 335 F.2d 898, 901 (7th Cir. 1964).

¹⁷⁵ *United States v. Allen*, 551 F.2d 208, 210 (8th Cir. 1977).

¹⁷⁶ *United States v. Whyte*, 699 F.2d 375, 379–80 (7th Cir. 1983).

¹⁷⁷ I.R.C. § 6622(a) (2006).

¹⁷⁸ *See Gold-Kessler, supra* note 166, at 108–09 (concluding that taxpayers who voluntarily disclose unreported income before an investigation begins or information is received regarding their noncompliance may escape criminal liability).

¹⁷⁹ *United States v. Hebel*, 668 F.2d 995, 998–99 (8th Cir. 1982).

¹⁸⁰ *See* IRM 9.5.11.9 (Dec. 2, 2012) (explaining that the disclosure must be “truthful, timely, complete” and made before the IRS starts an investigation, notifies the taxpayer of an intention to do so, or has received information relating to failure to comply).

¹⁸¹ *See* I.R.C. § 6015(a)(2) (2006).

¹⁸² *See generally* I.R.C. § 6015 (containing the provision for “relief from joint and several liability on joint return”).

spouse will have her liability limited to only those items allocable to her; or (3) equitable relief under section 6015(f) for those innocent spouses who can prove full liability would be unfair due to factors such as economic hardship and abuse.¹⁸³ In section 6015(b) cases, the taxpayer has the burden of proving that he or she did not know there was “an understatement of tax attributable to [one or more] erroneous items [of the other spouse].”¹⁸⁴ In section 6015(c) (taxpayers no longer married) cases, the Service has the burden of proof.¹⁸⁵

This Article primarily addresses an election made under section 6015(c) or section 6015(f). In terms of both elections, a consideration of “significant benefit”—defined as any benefit beyond normal support due to the failure to report or pay tax—is a factor and is discussed *infra* in Part II.C.¹⁸⁶ The main problem with section 6015(c) is that a compliant spouse is ineligible for relief if the IRS demonstrates “actual knowledge” of a tax understatement at the time of the signing of the tax return.¹⁸⁷ However, even though section 6015(c) refers to knowledge of a tax understatement, courts have held that knowledge of the *underlying facts* giving rise to a deduction or omission of income is enough for ineligibility.¹⁸⁸ The primary problem with section 6015(f) is that the balancing test associated with it fails to correctly conceive of financial abuse and other forms of domestic abuse likely present in the discussed context.

1. *Current Provisions*

In order to obtain innocent spouse relief under section 6015(b) or section 6015(c), the taxpayer must petition the IRS no later than two years after collection activities have started.¹⁸⁹ In the event he or she does not, or otherwise cannot obtain relief under these two provisions, the spouse may obtain relief under section 6015(f): an equitable relief provision.¹⁹⁰ In determining section 6015(f) equitable relief, one of the factors considered is whether the spouse substantially benefited from the failure to pay taxes owed.¹⁹¹ This inquiry involves examining whether the spouse could make otherwise unaffordable expenditures by having larger amounts of disposable income.¹⁹² Additionally, a court may decide to grant section 6015(f) equitable relief if after the payment of the tax liability, the spouse would not have income left to cover

¹⁸³ See *id.* §§ 6015(b), (c), (f).

¹⁸⁴ See *id.* § 6015(b)(1)(B).

¹⁸⁵ *Id.* § 6015(c)(2).

¹⁸⁶ See *infra* Part II.C.

¹⁸⁷ I.R.C. § 6015(c)(3)(C) (2012).

¹⁸⁸ See McMahon, *supra* note 162, at 149.

¹⁸⁹ See I.R.C. §§ 6015(b)(1)(E), (c)(3)(B).

¹⁹⁰ *Id.* § 6015(f).

¹⁹¹ See Rev. Proc. 2003-61, 2003-2 C.B. 296, 298.

¹⁹² Albin v. Comm’r, 88 T.C.M. (CCH) 340, 347 (2004).

basic living expenses.¹⁹³ There are a number of factors examined to make this determination, including geographic area, the wife's age, employment status and history, and number of dependents.¹⁹⁴

Section 6015(f) equitable relief is also relevant when knowledge—either reason to know, as identified in section 6015(b) relief, or actual knowledge, as identified in section 6015(c) relief—are at play. Relevantly, a spouse who has knowledge may still be granted relief under section 6015(f) provided she (1) did not exercise control over her husband's business income and (2) did not have direct access to business receipts.¹⁹⁵ This would seem the case in the omission of income instances addressed in this section because if the wife had control over income or access to business receipts, she would not have to hire forensic accountants or expend funds for investigative accounting.¹⁹⁶ The importance of this distinction is discussed later in this section.¹⁹⁷

Nevertheless, because the IRS and Tax Court judges, like society and the family law system, misperceive financial abuse and other forms of domestic abuse, wives are routinely denied innocent spouse relief. Generally, innocent wives of high-net worth tax evaders would be deemed to have knowledge that income was received and thus ineligible for relief under section 6015(c), even though they did not know about offshore assets and accounts until they hired a forensic accountant in the divorce proceedings. Alternatively, their allegations of domestic abuse are not believed, and they are deemed ineligible for relief under section 6015(f).¹⁹⁸ This section argues that wives of noncompliant spouses fit the criteria set forth in section 6015(f) once misperceptions about financial and other forms of domestic abuse are corrected, and they should be granted innocent spouse relief.

2. Legislative History of Innocent Spouse Relief and Wives

An examination of the legislative history of innocent spouse relief shows that the provision was enacted to help wives specifically; they were seen as being unfairly burdened by the joint and several liability that attaches with the

¹⁹³ See, e.g., *Wiener v. Comm'r*, 96 T.C.M. (CCH) 227, 236, 238 (2008) (granting equitable relief to petitioner who had reason to know of items giving rise to tax deficiencies and/or failed to satisfy her duty of inquiry regarding these items, but who would suffer economic hardship if relief were not granted).

¹⁹⁴ *Treas. Reg.* § 301.6343-1(b)(4) (2002); see also I.R.S. Notice 2012-8, 2012-4 I.R.B. 311 (proposing “to provide minimum standards based on income, expenses, and assets, for determining whether the requesting spouse would suffer economic hardship if relief is not granted”).

¹⁹⁵ *Farmer v. Comm'r*, 93 T.C.M. (CCH) 1052, 1054 (2007).

¹⁹⁶ See *id.*

¹⁹⁷ See *infra* Part II.D.

¹⁹⁸ Jacqueline Clarke, *(In)Equitable Relief: How Judicial Misconceptions About Domestic Violence Prevent Victims from Attaining Innocent Spouse Relief Under I.R.C. § 6015(F)*, 22 AM. U.J. GENDER SOC. POL'Y & L. 825, 841 (2014) [hereinafter Clarke Study].

filing of a joint return.¹⁹⁹ An unnerving problem is that Congress failed to define “unfair burden” in this context.²⁰⁰ At the same time, there are other provisions in the Internal Revenue Code that may provide relief to wives who are unable to pay taxes owed, and the discussion here must acknowledge these other avenues as well.²⁰¹

Up until the end of the 1960’s, joint and several liability was applied without much objection from joint filers.²⁰² In the early years of joint filing, the only way wives could escape liability for taxes owed in connection with joint returns was to prove that they signed a return under duress.²⁰³ Moreover, relief under the now repealed I.R.C. § 6013(e) required a substantial understatement of tax.²⁰⁴ In 1971, after several wives were held liable for taxes owed due to their husband’s embezzlement, complaints arose regarding the inadequacy of the duress defense, and Congress’s answer was innocent spouse relief.²⁰⁵ As initially enacted, innocent spouse relief was not intended to apply to all joint filers but rather was to relieve wives from extreme financial hardship posed because of joint and several liability.²⁰⁶ Innocent spouse relief continued to operate as a constricted form of relief until 1984 when modest expansion occurred.²⁰⁷

However, it was not until 1998 that innocent spouse relief was liberalized to its present form since prior to this time relief was only available in a highly restricted form.²⁰⁸ In 1998, Congress enacted the IRS Restructuring and Reform Act of 1998 (RRA), which provided several exceptions to the usual rule of joint and several liability.²⁰⁹ One of the purposes of the RRA was to provide relief to

¹⁹⁹ See McMahon, *supra* note 162, at 147.

²⁰⁰ *Id.*

²⁰¹ See *id.* at 154–56; see also *supra* notes 159–61 and accompanying text.

²⁰² See *id.* at 147 n.25 (citing T.D. 1882, 15 Treas. Dec. Int. Rev. 203 (1913), which provides that husbands and wives may file taxes as one).

²⁰³ See *In re Hinckley*, 256 B.R. 814, 828 (2000); *Wiksell v. Comm’r*, 67 T.C.M. (CCH) 2360, 2368-69 (1994), *rev’d on other grounds*, 90 F.3d 1459 (9th Cir. 1996).

²⁰⁴ Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, 734-35 (1998).

²⁰⁵ Act of Jan. 12, 1971, Pub. L. No. 91-679, § 1, 84 Stat. 2063, 2063 (1971).

²⁰⁶ See S. REP. NO. 91-1537, at 2 (1971); H.R. REP. NO. 91-1734, at 3 (1971); STAFF OF THE JOINT COMM. ON TAXATION, 105TH CONG., PRESENT LAW AND BACKGROUND RELATING TO TAX TREATMENT OF “INNOCENT SPOUSES,” 6 (Comm. Print 1998); TREAS. DEP’T, 105-92, TREASURY DEPARTMENT REPORT ON INNOCENT SPOUSE RELIEF HEARING BEFORE THE SUBCOMMITTEE ON OVERSIGHT OF THE HOUSE COMMITTEE ON WAYS AND MEANS, 50 (1998).

²⁰⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/GGD-98-77R, TAX ADMINISTRATION: INNOCENT SPOUSE RELIEF (1998), <https://www.gao.gov/assets/90/87449.pdf> [<https://perma.cc/MW8A-9WSS>].

²⁰⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, GA0-02-558, TAX ADMINISTRATION: IRS’S INNOCENT SPOUSE PROGRAM PERFORMANCE IMPROVED; BALANCED PERFORMANCE MEASURE NEEDED 4 (2002); see also I.R.C. § 6013, *repealed by* Pub. L. 105-206, tit. III, § 3201(e)(1), 112 Stat. 740 (1998).

²⁰⁹ I.R.C. § 6015 (2012); see also Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, 734-35 (1998).

wives who unknowingly became liable for tax deficiencies caused by their husbands.²¹⁰ As stated in the 1998 Congressional Conference Report, prior to the passage of the RRA, 90% of innocent spouse relief cases were brought by wives.²¹¹ Moreover, Professor Stephanie McMahon's 2012 empirical study confirms that women make up an overwhelming number of innocent spouse relief requests.²¹² Specifically, 338 women compared to 59 men brought cases before the Tax Court, i.e., 85% of the cases were from women.²¹³ In fact, McMahon emphasizes that Congress termed innocent spouse relief a women's issue.²¹⁴ Jacqueline Clarke's 2014 study builds upon the McMahon Empirical Study and evinces that the number is even more skewed in terms of the number of requesting taxpayers who alleged abuse.²¹⁵ She found that 91.67% of taxpayers requesting innocent spouse relief while alleging abuse were women.²¹⁶ Notably, women have won 89.50% of innocent spouse relief victories in general and 93% of those where abuse was alleged.²¹⁷ One must conclude, as Clarke does, that innocent spouse relief and allegations of abuse are gendered in terms of the tax world.²¹⁸

Nevertheless, it is clear that family law courts and tax courts still misconceive domestic violence and the danger it poses.²¹⁹ Typically, women who raise domestic violence concerns are mischaracterized as doing so to gain

²¹⁰ See McMahon, *supra* note 162, at 147; see also 144 CONG. REC. 14,688–689 (1998); H.R. REP. NO. 105-599, at 252–53 (1998) (Conf. Rep.) (stating that women commonly are liable for their ex-husband's tax liabilities resulting from their filing of illegal tax returns).

²¹¹ 144 CONG. REC. 14737 (1998); see also Stephen Zorn, *Innocent Spouses, Reasonable Women and Divorce: The Gap Between Reality and the Internal Revenue Code*, 3 MICH. J. GENDER & L. 421, 425 n.13 (1996).

²¹² Stephanie Hunter McMahon, *An Empirical Study of Innocent Spouse Relief: Do Courts Implement Congress's Legislative Intent?*, 12 FLA. TAX REV. 629, 662 (2012) [hereinafter McMahon, *Empirical Study*].

²¹³ *Id.*

²¹⁴ *Id.* at 631.

²¹⁵ Clarke Study, *supra* note 198, at 836. Both studies are described in detail and are discussed *infra* Part II.C.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* The Clarke Study points out the inconsistent gendered nature of domestic violence in other contexts. See *id.* For example, a study conducted by the National Coalition Against Domestic Violence found 85% of domestic violence victims are women. *Id.* at 836, n.74 (citing CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: CRIME DATA BRIEF, INTIMATE PARTNER VIOLENCE, 1993-2001 (2003), <https://www.bjs.gov/content/pub/pdf/ipv01.pdf> [<https://perma.cc/Z3WJ-R4DL>]). However, a 2010 national survey by the U.S. Department of Justice and the Centers for Disease Control and Prevention contradicts this result. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, DIV. OF VIOLENCE PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (Nov. 2011), 18–20 https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [<https://perma.cc/M3Y7-8UMA>].

²¹⁹ Clarke Study, *supra* note 198, at 828–29.

a tactical advantage.²²⁰ In order to properly analyze the granting of innocent spouse relief to women, one must understand the other biases that operate in our justice system.²²¹ Additionally, Clarke confronts the distressing problem that some men may feign abuse and claim innocent spouse relief when, in fact, they are the abuser in the relationship.²²²

It is estimated that since the RRA was passed, the IRS has received more than 1,000 applications for innocent spouse relief every week.²²³ As part of sweeping changes resulting from Congress' direction to the IRS to view taxpayers more akin to customers, the innocent spouse relief provisions became more flexible and thereby opened up to a larger number.²²⁴ Instead of focusing on financial hardship, the provisions focused on whether innocent spouse relief granted "meaningful relief in all cases where such relief is appropriate."²²⁵ Nevertheless, Congress' failure to define when such relief is "appropriate" has led to a number of problems, which are relevant for the aforementioned discussion. For example, is it "appropriate" to provide relief to spouses who were not coerced into false tax reporting?²²⁶ Is it "appropriate" to afford relief to spouses who are already suffering financial hardship?²²⁷ When one examines the committee reports and statements made during the congressional debates, a common thread is that an innocent spouse is one who lacked knowledge of his or her spouse's wrongdoing in filing a fraudulent return.²²⁸

²²⁰ PETER G. JAFFE ET AL., CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 17 (2003) (stating that judges tend not to believe women who raise concerns about domestic violence because they are perceived as doing so to strengthen their contentions for custody).

²²¹ Clarke Study, *supra* note 198, at 836.

²²² *See id.* at 837 (recognizing at the same time that some men are actually subject to abuse and are less likely to have evidence of it given their hesitancy to report abuse by their wives).

²²³ *See* Steve Johnson, *The 1998 Act and the Resources Link Between Tax Compliance and Tax Simplification*, 51 U. KAN. L. REV. 1013, 1044 (2003); Kari Smoker, Comment, *Internal Revenue Service Restructuring and Reform Act of 1998: Expanded Relief for Innocent Spouses—At What Cost? A Feminist Perspective*, 60 OHIO ST. L.J. 2045, 2088 (1999).

²²⁴ H.R. REP. NO. 105-599, at 252-55 (1998) (Conf. Rep.); 144 CONG. REC. 3234 (1998).

²²⁵ H.R. REP. NO. 104-506, at 7-8.

²²⁶ *See* McMahon, *supra* note 162, at 148 (interpreting "truly innocent" spouses only as those who are "coerced into filing the return").

²²⁷ *See id.*

²²⁸ *See, e.g.*, S. REP. NO. 105-174, at 56-58 (1997) (discussing that it is inequitable to hold a spouse liable if they did not know or had no reason to know); H.R. REP. NO. 105-599, at 252-55 (1998) (discussing that the conferees intended an innocent spouse to have no knowledge); 144 CONG. REC. 8509 (1998) (statement of Sen. Barbara Boxer) ("An 'innocent spouse' is one—usually a wife—who signs a joint tax return not knowing that the information contained therein . . ."); 144 CONG. REC. 8517-8518 (1998) (statement of Sen. Dianne Feinstein) ("The bill would expand the protections provided to 'innocent spouses' who find themselves liable for taxes, interest, or penalties because of a spouse's action taken without their knowledge."); 144 CONG. REC. 14689 (1998) (statement of Sen. William Roth) (discussing relief will not be available if a spouse did not have any knowledge); 144 CONG.

It is patently clear that Congress' expanded relief was meant primarily for wives.²²⁹ The unrelenting pursuit of wives in terms of abusive collection was deemed unacceptable.²³⁰ Moreover, Congress intended to provide relief to divorced or separated wives who were left with debilitating tax liabilities due to calculating and deceiving husbands.²³¹ Some scholars have posited that Congress left the definition of "appropriate" ambiguous due to the costs associated with drafting a more specific rule.²³² Nevertheless, the IRS and the courts have been left to use, in most cases, a facts and circumstances test to determine whether relief is warranted.²³³ While the two other forms of relief explicitly call for an examination of equity,²³⁴ the section 6015(c) form does not expressly.²³⁵ As explained earlier, section 6015(c) relief is intended to assist the spouses that are divorced or separated.²³⁶ These wives are able to obtain relief

REC. 14715 (1998) (statement of Sen. Carol Moseley-Braun) (discussing the story of a constituent who did not know her spouse fraudulently filed the return).

²²⁹ All Congressional Record references regarding innocent spouse relief were to wives, usually divorced wives. *See, e.g.*, 144 CONG. REC. 2045 (1998) (statement of Sen. Bob Graham) (discussing how a wife may have little income and sign a return she knows little about); 144 CONG. REC. 2043 (1998) (statement of Sen. Al D'Amato) (discussing how this will mostly help women and that many divorced/separated women came forward at the hearing); 144 CONG. REC. 8510 (1998) (statement of Sen. Spencer Abraham) (discussing the story of a divorced immigrant who faced joint and several liability); 144 CONG. REC. 7694 (1998) (statement of Sen. Mike DeWine) (discussing testimony, including from a divorced woman from Toledo); 144 CONG. REC. 13968 (1998) (statement of Rep. William Archer) (discussing how the act gives new protections, including spousal relief to women). Husbands as victims were infrequently mentioned; *see also* 144 CONG. REC. 8521 (1998) (statement of Sen. Olympia Snowe) (examining the potential benefits from spousal relief and only giving examples with women in them).

²³⁰ 144 CONG. REC. 1417-18 (1998).

²³¹ *See* McMahon, *Empirical Study*, *supra* note 212, at 636-42 (highlighting that Congress "referr[ed] to wives who were deceived before being left" struggling under large tax bills, "often while caring for the couples' children" and noting there was no discussion of less sympathetic cases).

²³² *See* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 73 (1983) (describing costs associated with precise rulemaking).

²³³ *See* McMahon, *supra* note 162, at 149-50.

²³⁴ I.R.C. §§ 6015(b), (f) (2006). The Treasury Department has been given the task of determining the balancing factors. *See* Rev. Proc. 2013-34, 2013-43 I.R.B. 397-401; Treas. Reg. §§ 1.6015-2(d), -4(c) (2002); I.R.S. Notice 2012-8, 2012-4 I.R.B. 309; Notice 2013-32, 2013-43 I.R.B. 397.

²³⁵ I.R.C. § 6015(c); Rev. Proc. 2003-61, 2003-2 C.B. 296; Treas. Reg. § 1.6015-2(d) (2002); Treas. Reg. § 1.6015-4(c) (2002); I.R.S. Notice 2012-8, 2012-4 I.R.B. 309; Rev. Proc. 2013-34, 2013-43 I.R.B. 397.

²³⁶ McMahon, *supra* note 162, at 150 ("A third subsection provides relief that is meant to function as a clear allocation of liability for divorced, widowed, or separated spouses unless the spouse is proven to have actual knowledge of the tax evasion. However, this third test is not applied mechanically. Not only do courts consider equitable factors before applying this last form of relief, in 15.4% of reported cases in which a spouse won under this third test the requesting spouse was found to have actual knowledge of the tax evasion contrary to the test's statutory requirement."). Widowed spouses are also included. *Id.*

provided they did not have “actual knowledge,” which is a problematic requirement as this Article explains.²³⁷

3. *Lingering State Liability*

Even if a wife secures federal innocent spouse relief, a state hurdle of liability may also be present. Both marriage and dissolution are governed by state law.²³⁸ State courts tasked with dividing marital assets have mainly affirmed their right to do so—separate and without influence from any IRS or federal tax court proceedings.²³⁹

For example, in the 1984 *In re Marriage of Dunseth*, the Appellate Court of Illinois scolded a trial court for trying to protect a wife in a dissolution proceeding from liability owed to creditors, including the IRS.²⁴⁰ The appellate court maintained that the creditors were not parties to the proceeding, and therefore, the trial court’s order that the husband pay debts owed to them was not binding upon the creditors.²⁴¹ Importantly, the *Dunseth* court was skeptical of the innocent spouse relief the wife had obtained because she enjoyed a lavish lifestyle during the marriage due to her husband’s failure pay taxes, *inter alia*.²⁴²

Several months later, the Ninth Circuit held that an innocent spouse determination is not controlling in terms of contribution rights under state law under either the Supremacy Clause or the doctrine of *res judicata*.²⁴³ Contribution rights could stem from either a divorce decree or a general contribution statute.²⁴⁴ In this case, a former husband sought to challenge the Tax Court’s acceptance of his ex-wife’s and the IRS’s stipulation that the ex-wife was an innocent spouse “on the ground that she relied on her husband and their accountant to assure that the returns were properly prepared, and she did not benefit from the understatement of tax because the unpaid tax money was spent on his new wife or previous affairs.”²⁴⁵

In other words, state decisions confirm a wife may receive innocent spouse relief from the IRS but still remain liable for an allocation of tax liability under state law.²⁴⁶ The California Court of Appeals case *In re Marriage of Hargrave*

²³⁷ I.R.C. § 6015(c)(3)(C).

²³⁸ See Gold-Kessler, *supra* note 166, at 109.

²³⁹ *Id.*

²⁴⁰ *In re Marriage of Dunseth*, 633 N.E.2d 82, 94–95 (Ill. App. Ct. 1994).

²⁴¹ *Id.* at 94 (noting that even if the wife convinced the IRS she was an innocent party she would also have to make the same showing in a proceeding where the IRS was a party).

²⁴² *Id.* at 95.

²⁴³ *Estate of Ravetti v. United States*, 37 F.3d 1393, 1395 (9th Cir. 1994).

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 1394 (internal quotations omitted).

²⁴⁶ *Id.* at 1395–96. In addition, consent judgements and marital settlement agreements have been deemed controlling even in the face of subsequent federal innocent spouse relief. See, e.g., *PM v. MW*, Nos. 1095-83, 06-28642, 2007 WL 1518621, at *2 (Del. Fam. Ct. Feb. 23, 2007) (“[B]oth parties will share the penalties to the IRS as was the terms of their agreement.”); *Kozak v. Kozak*, No. 198799, 1998 WL 1990458, at *3 (Mich. Ct. App. Aug.

admonishes spouses that it is not a foregone conclusion that they will escape tax liability through a grant of innocent spouse relief where a state court previously has apportioned liability in a dissolution proceeding.²⁴⁷ The Kentucky Court of Appeals has taken a similar approach, reasoning that IRS innocent spouse relief is an “administrative process” and not an adjudication that directs the party from whom the IRS will pursue payment.²⁴⁸ It further noted that a Federal Tax Court decision is not controlling in terms of state division of marital debt that encompasses tax liability.²⁴⁹

The Court of Appeals of Washington has taken a slightly softer stance.²⁵⁰ It has acknowledged that the deliberate and unnecessary shoring up of tax liability by one spouse may be considered in apportioning marital debts in a dissolution proceeding.²⁵¹ At the same time, the Court prohibited a trial court from basing its order on a federal innocent spouse relief finding.²⁵² Some appellate courts have concluded that federal tax liability must be litigated solely in federal courts relying on precedent from other jurisdictions.²⁵³ Similarly, the Court of Appeals of Wisconsin recognized in *In re Marriage of Jahimiak* that although the trial court may not make a determination as to federal innocent spouse relief, it could properly allocate marital debt to the spouse who was in charge of family finances and prepared the tax returns as well as was the only beneficiary of the false returns.²⁵⁴

The Court of Appeals of Arkansas has taken a slightly more nuanced approach, and Nebraska has largely agreed with it. In *Killough v. Killough*, the appellate court upheld a trial court’s divorce decree allocating to the husband responsibility for paying penalties and interest resulting from his failure to report income and allocating to the wife one half of the tax liability that she

4, 1998) (holding that it is unreasonable to change the tax liabilities when they specifically intended to share them); *Bryant v. Flint*, 894 S.W.2d 397, 400 (Tex. App. 1994) (“Although the IRS ‘innocent spouse’ exemption may have extinguished her liability to the IRS, it did not diminish her liability to the estate under the settlement agreement.”).

²⁴⁷ *In re Marriage of Hargrave*, 43 Cal. Rptr. 2d 474, 478 (Ct. App. 1995).

²⁴⁸ *Dobson v. Dobson*, 159 S.W.3d 335, 337 (Ky. Ct. App. 2004).

²⁴⁹ *Id.*

²⁵⁰ *In re Marriage of Steadman*, 821 P.2d 59, 62 (Wash. Ct. App. 1991).

²⁵¹ *Id.*

²⁵² *Id.* at 61. *But cf. In re Marriage of Behar*, No. D045377, 2005 WL 2697250, at *7 (Cal. App. Ct. Oct. 21, 2005) (concluding that where it was unlikely that the husband would receive innocent spouse relief, it was appropriate to assign tax liabilities stemming from the wife’s separate property as marital debt).

²⁵³ *See Lakewood Plantation, Inc. v. United States*, 272 F. Supp. 290, 294 (D.S.C. 1967); *see also Craig v. United States*, 69 F. Supp. 229, 239 (W.D. Pa. 1946) (“[I]n order to achieve absolute uniformity in all of the states of the Union in connection with tax liability created by Revenue Acts enacted by Congress . . . the state courts’ decisions of questions, over which they have final say, cannot and should not decide issues of federal tax law and thus hamper the effective enforcement of a valid federal tax.”).

²⁵⁴ *In re Marriage of Jahimiak*, No. 99-0922, 2000 WL 280300, at *5 (Wis. Ct. App. Mar. 16, 2000).

would have been responsible for if the income had been reported.²⁵⁵ The Supreme Court of Nebraska has taken a similar approach, characterizing penalties and interest as nonmarital debt and allocating liability for them to the spouse responsible for the incurrence.²⁵⁶ Likewise, funds owed to the IRS spent by one spouse on nonmarital pursuits have been deemed nonmarital debt.²⁵⁷

On the one hand, the trial court setting serves as another bite at the apple beyond federal innocent spouse relief to shield a spouse from at least civil liability provided a convincing case exists that equity dictates such a result.²⁵⁸ On the other hand, there is no guarantee that the trial court will uphold a grant of federal innocent spouse relief.²⁵⁹ However, it is still important for a wife of a noncompliant spouse to receive at least federal innocent spouse relief and hopefully reforms in that area will lead to eventual state reform as well.

C. Problems with the Current Approach

An examination of innocent spouse relief reveals that it is quite difficult to obtain.²⁶⁰ One of the reasons for the difficulty in securing relief under section 6015(c) is the mismatch in terms of intent. As explained earlier, a noncompliant spouse must intentionally violate a known legal duty to face criminal prosecution or penalties.²⁶¹ In contrast, a compliant spouse is disqualified from receiving innocent spouse relief by simply knowing that income was received.²⁶² In other words, a compliant spouse who does not know about the legal duty to report or pay tax on foreign income typically will be ineligible for innocent spouse relief under current law: “actual knowledge” of any item giving rise to a tax deficiency (i.e., knowledge that income was received) is enough to disqualify such a spouse even if the individual had no knowledge of the source of such income.²⁶³ Until this inequity is corrected, we are disincentivizing compliant spouses from working with the government and punishing them for the sins of the noncompliant spouse, even if they knew nothing about them.

Another contributing factor is the pervasive misperception about financial and other forms of domestic abuse. In theory, there are two ways out of the “actual knowledge” trap. First, an “innocent” spouse may receive relief despite actual knowledge if the individual was (1) “the victim of [domestic] abuse” before the return was signed and (2) as a result, failed to challenge the treatment

²⁵⁵ Killough v. Killough, 32 S.W.3d 57, 58–59 (Ark. Ct. App. 2000).

²⁵⁶ Carter v. Carter, 626 N.W.2d 576, 581 (Neb. 2001).

²⁵⁷ *Id.*

²⁵⁸ *See id.*

²⁵⁹ *See id.* (holding under the facts of that case the court granted equity).

²⁶⁰ *See* McMahon, *Empirical Study*, *supra* note 212, at 646; *see also* Clarke Study, *supra* note 198, at 827.

²⁶¹ *See supra* Part I.C.

²⁶² I.R.C. § 6015(c)(3)(C)(2006).

²⁶³ Treas. Reg. § 1.6015-3(c)(2) (2002).

of any item out of fear of retaliation.²⁶⁴ Second, an innocent spouse who signed the return under duress remains eligible.²⁶⁵ Nevertheless, the stark reality is that innocent spouse relief is denied even where domestic abuse, including financial abuse, is shown.²⁶⁶

As Clarke has stated, the IRS and the Tax Court do not understand the “interplay between domestic violence and innocent spouse cases.”²⁶⁷ Moreover, National Taxpayer Advocate Nina Olson has reprimanded the IRS for “display[ing] an astonishing ignorance about what happens to people in abusive relationships” in the context of innocent spouse relief cases.²⁶⁸ In the 2008 case, *Nihiser v. Commissioner*, Judge Holmes voiced a similar concern and noted the lack of regulations and “ordinary canons of construction” in this context.²⁶⁹ Finally, scholars have also commented upon the dearth of empirical research regarding innocent spouse relief and the even greater void in terms of conclusions about how Tax Court judges rule on domestic abuse claims.²⁷⁰

Two leading studies are discussed in the following analysis of problems with current innocent spouse relief under section 6015(c) and section 6015(f). McMahon performed an empirical analysis of 444 innocent spouse relief claims from 1998 through 2011, noting how the Tax Court examined the factors from Revenue Ruling 2003-61 (“the McMahon Empirical Study”).²⁷¹ Clarke focused more on the issue of abuse and thus specifically dealt with the fifty-six cases where the “innocent spouse” alleged abuse (“the Clarke Study”).²⁷² Her goal was to determine what had happened when the abuse claim was sustained versus denied as a means of ultimately determining what factors courts deem dispositive in this context.²⁷³ The Clarke Study,²⁷⁴ like the McMahon Empirical Study, focuses on Tax Court cases since the majority of innocent spouse relief appeals are heard there.²⁷⁵

²⁶⁴ Rev. Proc. 2013-34, 2013-43 I.R.B. 400.

²⁶⁵ I.R.C. § 6015(c)(3)(C).

²⁶⁶ See Clarke Study, *supra* note 198, at 833.

²⁶⁷ *Id.*

²⁶⁸ See Fred Stokeld, *Taxpayer Advocate Blasts IRS's Handling of Innocent Spouse Case*, TAX NOTES (Jan. 31, 2011), http://www.woodporter.com/Publications/Articles/pdf/Taxpayer_Advocate_Blasts_IRS_Handling.pdf [<https://perma.cc/YHE4-ED5M>].

²⁶⁹ *Nihiser v. Comm'r*, 95 T.C.M. (CCH) 1531, 1537 (2008).

²⁷⁰ See Michael Bommarito et al., *An Empirical Survey of the Populations of U.S. Tax Court Written Decisions*, 30 VA. TAX. REV. 523, 526 (2011); Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M.L. REV. 325, 325 (2001).

²⁷¹ See McMahon Empirical Study, *supra* note 212, at 635.

²⁷² Clarke Study, *supra* note 198, at 833.

²⁷³ *Id.*

²⁷⁴ For a complete description of the Clarke Study and its reliance on the McMahon Empirical Study. See *id.* at 834.

²⁷⁵ See McMahon Empirical Study, *supra* note 212, at 648, 649 (noting that 89.2% of appeals from IRS innocent spouse relief decisions are heard in Tax Court). Remaining cases are heard in the Court of Claims, District Courts, and Circuit Courts). *Id.*

1. Election Under Section 6015(c)

“Actual knowledge” under I.R.C. § 6015(c) is determined according to a facts and circumstances test detailed in Treasury Regulation § 1.6015-3(c)(2)(iv).²⁷⁶ This test involves, for example, exploring whether the spouse deliberately avoided learning about an item on the tax return or had an ownership interest in the property that resulted in an erroneous item on the return.²⁷⁷ At the same time, the IRS’s burden in proving “actual knowledge” is a mere preponderance of the evidence, which stands in sharp contrast to the beyond a reasonable doubt standard necessary for a criminal conviction of the noncompliant spouse.²⁷⁸ One bright side for the innocent spouse is that the IRS cannot meet the preponderance of the evidence standard with mere proof of what a reasonably prudent person would be expected to know.²⁷⁹

In terms of this Article, the “omitted income” innocent spouse cases are the most relevant. A noncompliant spouse—and by virtue of joint and several liability, their compliant spouse—who fails to report offshore income would fall into this category. A major problem with innocent spouse relief in the context of omitted income cases is the key question that the IRS and courts ask: whether the “innocent spouse” had knowledge of the *receipt* of income, not knowledge of the *source* of income.²⁸⁰ For example, if a wife knows the husband owns corporate stock but does not know a dividend has been paid, she remains eligible for innocent spouse relief.²⁸¹ However, if a wife knows that \$150,000 was received but does not know the source of the money, she becomes ineligible.²⁸²

Even more perplexingly, under the Treasury Regulations, lack of knowledge of how an item was reported is not relevant.²⁸³ In the 2002 D.C. Circuit case *Mitchell v. Commissioner*, a wife was held ineligible for innocent spouse relief because she knew of the receipt of a retirement plan distribution even though she did not know the tax consequences of the distribution.²⁸⁴ The Fifth Circuit case *Cheshire v. Commissioner* bars relief for all spouses with actual knowledge of the income producing transaction, even if such spouses lack knowledge of the incorrect tax reporting of the transaction.²⁸⁵ However, in *Martin v. Commissioner of Internal Revenue*, a wife who knew her husband had transferred stock and land but did not know the amount that was transferred was deemed not to have actual knowledge regarding the amount of financial gain

²⁷⁶ Treas. Reg. § 1.6015-3(c)(2)(iv) (2002).

²⁷⁷ *Id.*

²⁷⁸ *Id.* § 1.605-3(c)(2).

²⁷⁹ See *Culver v. Comm’r*, 116 T.C. 189, 189 (2001).

²⁸⁰ See Treas. Reg. § 1.6015-3(c)(2)(i), (iii).

²⁸¹ *Id.*

²⁸² See *id.*

²⁸³ *Id.* § 1.6015-3(c)(2)(ii).

²⁸⁴ *Mitchell v. Comm’r*, 292 F.3d 800, 803 (D.C. Cir. 2002).

²⁸⁵ *Cheshire v. Comm’r*, 115 T.C. 183 (2000), *aff’d*, 282 F.3d 326, 336 (5th Cir. 2002).

from the transaction.²⁸⁶ One may conclude that the only “knowledge” required to disqualify a compliant spouse is knowledge of the amount of money received, not knowledge of incorrect reporting or of failure to report the income.

Under the current law, coercion and deception, both of which are likely relevant in the offshore context, are not enough to achieve innocent spouse relief. Although due to a change in 2012 coercion was to receive greater weight in terms of the balancing factors used in determining whether innocent spouse relief will be granted, it has served an unclear role.²⁸⁷ A dispositive indicator of coercion is whether abuse was present.²⁸⁸ However, coercion and abuse have been treated inconsistently in this context.²⁸⁹ In 60.7% of the cases where abuse was alleged, the court found no abuse but still granted relief in 14.7% of these cases.²⁹⁰ In 27.3% of cases where abuse was found, no relief was granted.²⁹¹

Currently, the innocent spouse relief form does not even ask about deception.²⁹² While a lack of knowledge does not necessarily mean deception is present, it is an important factor to consider in determining whether a wife was innocent in signing a return. In 2012, it was determined that deception alone was not enough for relief.²⁹³ In fact, wives who have asserted they were deceived about an ineligible deduction or unreported income have had this argument backfire.²⁹⁴ In other words, they were denied relief because they were deemed to have actual knowledge of the deficiency.²⁹⁵

Moreover, due to a change in 2012, it was supposed to become easier to achieve relief where abuse or a lack of financial control were shown. These factors were to outweigh others in the balancing test.²⁹⁶ Clearly, that has not been the case as illustrated in the next section.

2. Election Under Section 6015(f)

Unfortunately, wives who are victims of domestic abuse, including financial abuse, often are not provided with innocent spouse relief because the tax system misconceives the nature of domestic violence. Specifically, the factors the IRS

²⁸⁶ *Martin v. Comm’r*, 80 T.C.M. (CCH) 665, 670 (2000).

²⁸⁷ *McMahon*, *supra* note 162, at 156.

²⁸⁸ *Id.* at 151.

²⁸⁹ *See McMahon, Empirical Study*, *supra* note 212, at 695.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *See* INTERNAL REVENUE SERV., FORM 8857: REQUEST FOR INNOCENT SPOUSE RELIEF (2014).

²⁹³ *McMahon*, *supra* note 162, at 152.

²⁹⁴ *See Cheshire v. Comm’r*, 115 T.C. 183 (2000), *aff’d*, 282 F.3d 326, 335 (5th Cir. 2002); *Wiskell v. Comm’r*, 90 F.3d 1459, 1462–63 (9th Cir. 1996).

²⁹⁵ *See Cheshire*, 282 F.3d at 335; *Wiskell*, 90 F.3d at 1463.

²⁹⁶ *See* I.R.S. Notice 2011-70, 2011-2 I.R.B. 135 (eliminating the two-year statute of limitations for § 6015(f) requests). Rev. Proc. 2003-61, 2003-2 C.B. 297. I.R.S. Notice 2012-8, 2012-4 I.R.B. 309, expanded the definitions of factors, which were expanded again in Rev. Proc. 2013-34, 2013-43 I.R.B. 398.

and the Tax Court use to determine whether a victim of domestic violence should receive relief under section 6015(f) often lead to inequitable outcomes.²⁹⁷ There is no guidance in the Internal Revenue Code for how the Tax Court should even evaluate a claim of abuse.²⁹⁸ Instead, there is only Revenue Procedure Ruling 2003-61, which provides a list of factors that the Tax Court should consider in deciding an innocent spouse relief claim.²⁹⁹ Perhaps more distressing, Tax Court opinions reflect inconsistent and unattainable requirements in terms of how to substantiate abuse claims.³⁰⁰ For example, judges have denied claims for relief unless a protection order was granted.³⁰¹ In other instances, judges have dismissed the alleged abuse as not serious if joint custody of a child has been granted.³⁰² These rulings show that Tax Court judges do not understand the power and control dynamics that accompany domestic abuse.³⁰³

Clarke examined sixty Tax Court cases where the innocent spouse sought relief and made a claim of domestic violence.³⁰⁴ Specifically, the study examined whether the Tax Court upheld a claim of domestic violence, and if so, upon what evidence.³⁰⁵ The study then determined whether there was a correlation between a finding of domestic violence and the granting of equitable relief under section 6015(f).³⁰⁶ Clarke noted that her research was aimed at “provid[ing] equitable tax relief to victims of domestic abuse who, because of the misconceptions of domestic violence in the present tax system, might otherwise be unsuccessful in their endeavors.”³⁰⁷

Under section 6015(f), a spouse is granted relief from a tax deficiency provided “taking into account all of the facts and circumstances, it is inequitable” to deny relief.³⁰⁸ To make this determination, the IRS must use a set of revenue procedure guidelines established by the Internal Revenue Service Commissioner in 2003.³⁰⁹ Pursuant to Revenue Ruling 2003-61, the spouse

²⁹⁷ See Clarke Study, *supra* note 198, at 828.

²⁹⁸ *Id.*

²⁹⁹ See Rev. Proc. 2003-61, 2003-2 C.B. 296.

³⁰⁰ See Clarke Study, *supra* note 198, at 828.

³⁰¹ See *Acoba v. Comm’r*, No. 4002-05S, 2010 WL 1993610, at *5 (T.C. May 19, 2010) (noting that a restraining order had been issued but where it is unclear whether the order was the result of the husband’s abuse during the marriage or after the commencement of the divorce proceedings).

³⁰² See *Sotuyo v. Comm’r*, No. 25692-10S, 2012 WL 1021306, at *5 (T.C. Mar. 27, 2012) (concluding that the wife’s evidence of abuse was insufficient to show she failed to challenge the husband’s omission of income because she feared retaliation based upon a grant of joint legal and shared custody and the lack of a supervised visitation order).

³⁰³ See Clarke Study, *supra* note 198, at 828.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 828–29.

³⁰⁸ I.R.C. § 6015(f) (2006).

³⁰⁹ Rev. Proc. 2003-61, 2003-2 C.B. 296.

must meet seven threshold requirements before the request for equitable relief under section 6015(f) will even commence.³¹⁰ If a requesting spouse meets these seven threshold requirements, she may automatically qualify for relief under section 6015(f) provided she falls under the safe harbor.³¹¹ To qualify under the safe harbor, she must show (1) she is legally separated or divorced at the time of requesting relief;³¹² (2) she had no knowledge or reason to know at the time she signed the return that her spouse would not pay the liability;³¹³ and (3) she would incur economic hardship if relief were denied.³¹⁴ At the same time, if the innocent spouse does not satisfy the safe harbor requirements, the IRS can still conclude that equitable relief is warranted by using a balancing test.³¹⁵ A non-exhaustive list of balancing factors also is set forth in Revenue Ruling 2003-61.³¹⁶ These factors include whether the innocent spouse benefited significantly from the failure to pay taxes owed, was subject to abuse, or had poor mental or physical health when she signed the return.³¹⁷ The IRS will then determine whether each of the balancing factors supports relief, does not support relief, or is neutral.³¹⁸ In terms of innocent spouse relief applicants who are also victims of domestic violence, the two most important facts to prove concern (1) whether she had knowledge of the understatement of tax and (2) whether she was abused in the marriage.³¹⁹

³¹⁰ *Id.* at 297. These seven threshold requirements are the following: (1) the filing of a joint return, (2) an inability to qualify for relief under IRC §§ 6015(b) and (c), (3) a timely application for relief, (4) an absence of fraudulent transfers of assets, (5) an absence of transfers of disqualified assets, (6) an absence of fraudulent intent, (7) the tax deficiency is due to the non-requesting spouse. *Id.*

³¹¹ *Id.* at 298.

³¹² *Id.*

³¹³ In terms of this factor, the court considers (1) her level of education; (2) the presence of deception or evasiveness on the part of the husband, (3) her degree of involvement in the activity leading to the income tax liability, (4) her involvement in business and household financial issues, (5) her financial expertise, and (6) any lavish spending or purchases. *Id.*

³¹⁴ *Id.* In order to determine economic hardship, factors detailed in Treas. Reg. § 301.6343-1(b)(4) are used. Rev. Proc. 2003-61, 2003-2 C.B. 298. These factors include (1) the wife's age, employment, ability to earn, and number of dependents, (2) reasonably necessary expenses for basic living expenses such as food, clothing, housing, medical, and transportation; and (3) cost of living in the relevant geographic area. Treas. Reg. § 301.6343-1(b)(4) (2018); Rev. Proc. 2003-61, 2003-32 C.B. 298; *see also* Butner v. Comm'r, 93 T.C.M. (CCH) 1290, 1297 (2007) ("[E]conomic hardship exists if collection of the tax liability will cause a taxpayer to be unable to pay such taxpayer's reasonable basic living expenses.").

³¹⁵ Butner, 93 T.C.M. (CCH) at 1296.

³¹⁶ Rev. Proc. 2003-61, 2003-2 C.B. 298-99.

³¹⁷ *Id.* at 299.

³¹⁸ *Id.* at 298.

³¹⁹ *Id.* at 298-99. The requesting wife must prove that she did not have knowledge or reason to know. *Id.* at 298. Failure to do so will count against her claim for relief. *Id.* Failure to prove abuse, on the other hand, will have a neutral effect. *Id.* at 299.

If a requesting spouse can establish duress, she will be entitled to innocent spouse relief.³²⁰ However, if she is unable to prove duress and does not fall within the safe harbor provision above, she will be left with trying to prove abuse during the marriage.³²¹ It is important to understand the difference between duress and abuse. Duress must be present at the time of the signing of the return, i.e., it is the forcing of the wife to sign the return.³²² In contrast, abuse (not rising to the level of duress) is different from duress in two fundamental ways: (1) it is perceived as less severe and (2) it occurs either before or after the signing of the return, not at the time the return is signed.³²³ For example, factor two of the safe harbor provision, i.e., lack of knowledge, was not satisfied in *Venables v. Commissioner* because the wife knew that their family was suffering financial difficulty when she signed the return.³²⁴ However, under the balancing test, the wife was able to show abuse.³²⁵ The Tax Court recognized that the husband financially controlled the wife by threatening to physically harm her whenever she asked to withdraw funds from their joint account.³²⁶ As a result, the wife was granted equitable relief despite her having had knowledge.³²⁷ Clarke provides a summary of the types of evidence the Tax Court relies upon in determining that abuse was present and the “potential biases and inconsistencies” that plague the analyses.³²⁸

Wives of noncompliant spouses should be entitled to relief due to the nature of their circumstances. This Article proposes that a spouse who has knowledge of the receipt of income, but who lacks knowledge of its source, i.e., who did not know that it came from hidden offshore assets/accounts (later discovered), should be eligible for innocent spouse relief under I.R.C. § 6015(c). Such spouses should be eligible to apply for innocent spouse relief before collection activity starts and even before the IRS notifies the taxpayer of an audit or possible outstanding liability.³²⁹

To summarize leading scholars in the area, innocent spouse relief is both under- and over-inclusive.³³⁰ The purpose of this Article is not to explore the overall shortcomings of innocent spouse relief. Rather, this Article focuses on granting wives of noncompliant spouses innocent spouse relief in order to promote their whistleblowing either during or after dissolution proceedings. A general belief among scholars in the area is that innocent spouse relief should

³²⁰ *Id.* at 297.

³²¹ *See, e.g.,* Stergios v. Comm’r, 97 T.C.M. (CCH) 1057, 1061 (2009).

³²² *See* Brown v. Comm’r, 51 T.C. 116, 119-20 (1968).

³²³ *See* Rev. Proc. 2003-61, 2003-2 C.B. 298.

³²⁴ *Venables v. Comm’r*, No. 22068-08S, 2010 WL 1980316, at *6 (T.C. May 18, 2010).

³²⁵ *See id.* at *7.

³²⁶ *Id.* at *1.

³²⁷ *Id.* at *7.

³²⁸ Clarke Study, *supra* note 198, at 832.

³²⁹ *See* Treas. Reg. § 1.6015-5(b)(3), (5).

³³⁰ *See, e.g.,* McMahon, *supra* note 162, at 151.

be available for taxpayers who are not culpable in filing.³³¹ Clearly, the wives of noncompliant spouses satisfy that criteria. Namely, this Article argues that coercion and deception should automatically entitle relief.³³² In the offshore context described in Part I, at least one of these factors, and likely both, are present. As a result, it is not only “appropriate” but also expedient in terms of overall collection objectives to grant such wives relief.

D. Rethinking Domestic Abuse and Innocent Spouse Relief

A common misconception about domestic violence is that victims fall within a certain stereotype.³³³ Typically, the perception is that such women are part of a lower socioeconomic class and also are either racial minorities or immigrants.³³⁴ Unfortunately, this latent bias leads many to fear that judges will not find domestic violence exists if the victim does not conform to these stereotypes.³³⁵ One may conclude that the wives of high-net-worth tax evaders will not fall within these stereotypes by virtue of their socioeconomic status alone. As a result, Clarke set out to elucidate the “diverse profiles of domestic violence victims” to disprove the veracity of traditional stereotypes.³³⁶ Moreover, she explored whether Tax Court judges nevertheless continue to award innocent spouse relief based upon inaccurate stereotypes.³³⁷ The following Part makes use of the Clarke Study to examine the obstacles that will

³³¹ See, e.g., *id.* at 145.

³³² See *id.* at 176–77.

³³³ See, e.g., Cynthia Willis Esqueda & Lisa A. Harrison, *The Influence of Gender Role Stereotypes, the Woman's Race, and Level of Provocation and Resistance on Domestic Violence Culpability Attributions*, 53 SEX ROLES 821, 822 (2005); Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 6, 10 (1998).

³³⁴ See Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219, 242 (1992) (discussing juror expectations in criminal cases about victims and their reactions to victims who do not comport with stereotypes). At the same time, there are misconceptions about the profiles of batterers. See James Martin Truss, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1166 (1995).

³³⁵ See Martha Shaffer & Nicholas Bala, *The Role of Family Courts in Domestic Violence: The Canadian Experience*, in PROTECTING CHILDREN FROM DOMESTIC VIOLENCE: STRATEGIES FOR COMMUNITY INTERVENTION 171, 175–76 (Peter G. Jaffe et al. eds., 2004); MARY ANN DUTTON, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN, UPDATE OF THE “BATTERED WOMAN SYNDROME” CRITIQUE 4 (Aug. 2009), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_BWSCritique.pdf [<https://perma.cc/7V3W-9PX9>]; Wendy McElroy, *Domestic Violence: Behind the Stereotypes*, IFEMINISTS.COM (Nov. 10, 2004), <http://www.ifeminists.net/introduction/editorials/2004/1110.html> [<https://perma.cc/R37Q-T3S8>] (noting the harmful effect of domestic violence stereotypes for women who do not fall within them).

³³⁶ See Clarke Study, *supra* note 198, at 835.

³³⁷ *Id.*

confront wives of high-net-worth tax evaders in seeking innocent spouse relief under section 6015(c) or section 6015(f) through the lens of likely attendant domestic abuse and proposes a solution.

1. *Domestic Abuse Victims Married to Primary Wage Earners*

Importantly for these purposes, in more than 60% of the Clarke Study cases, i.e., those where the requesting wife also alleged abuse, the abuser was the primary wage earner.³³⁸ In the high-net-worth divorces addressed here, the husband would also likely be the primary wage earner. As a result, Tax Court judges should be more cognizant of the likelihood that abuse is occurring in the cases described in Part I and rule appropriately.

As the Clarke Study evinces, there is no one distinguishing profile of a “domestic abuse victim seeking tax relief.”³³⁹ A wife’s educational level, employment qualifications, etc. are varied.³⁴⁰ However, one constant theme is the “economic dependence and financial control” present.³⁴¹ In approximately 53% of the cases, the non-requesting spouse had complete control over finances.³⁴² The requesting spouses alleging abuse typically reported that they either were given a strict allowance or knew nothing about the family’s finances.³⁴³ Relevantly, most of the requesting spouses were not alleging financial abuse even though it was present.³⁴⁴ Instead, they were asserting physical, verbal, or emotional abuse.³⁴⁵ Unfortunately, none of the regulations deal with whether financial control is indeed circumstantial evidence of abuse.³⁴⁶ Clarke strongly urges that where a requesting spouse is unable to provide evidence to corroborate allegations of other forms of abuse, judges should weigh the presence of financial abuse as indicative of abuse.³⁴⁷

2. *Preconceived Notions of Abuse*

An overarching and pervasive problem is how Tax Court judges perceive abuse.³⁴⁸ As recently apparent, media coverage perpetuates a conception of

³³⁸ *Id.* at 843. Clarke makes clear that in her study “91.67% of the requesting taxpayers who alleged abuse were women.” *Id.* at 836.

³³⁹ *Id.* at 854.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² Clarke Study, *supra* note 198, at 854.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 855.

³⁴⁸ See Clarke Study, *supra* note 198, at 856.

domestic abuse as involving physical violence and protection orders.³⁴⁹ As a result, if a requesting spouse alleges mental, emotional, or financial abuse, Tax Court and other judges will be reluctant to find abuse occurred because this type of abuse does not fit within their preconceived notions.³⁵⁰ At the same time, a wife who alleges physical abuse and does not have photos, protective orders, or medical records may also face an insurmountable obstacle in proving abuse in Tax Court.³⁵¹

In the controversial *O'Neil v. Commissioner* decision,³⁵² the American public became somewhat aware of the narrow view of domestic abuse used by Tax Court judges.³⁵³ Judge Holmes concluded that the plaintiff, Allison, did not prove abuse because there was no “documentation” of it.³⁵⁴ Attorney Cathy Brennan criticized this view since it fails to take account of the true dynamics of an abusive relationship and how an abuser “dominates all aspects of his partner’s life and uses all tactics available to him to control her.”³⁵⁵

Indeed, there is a high likelihood that this type of abuse is present where the husband is using offshore accounts and entities to hide money from his spouse. Taking the money offshore and then refusing to provide the wife with any information about it is part of a cycle of domination and control. Even when faced with sanctions and motions to compel in the family law context, an abusive husband will not provide his victim with requested information, reflecting a pervasive need to continue to control her.³⁵⁶

While the marital status of the wives described in Part II would weigh in favor of relief, the inconsistent and perplexing treatment of abuse in Tax Court will make the road to relief a difficult or impossible one. The Tax Court places significant weight on the marital status of the requesting spouse.³⁵⁷ Under section 6015(c), relief may be obtained only if the spouse is separated or divorced.³⁵⁸ Although a spouse who is still married may seek relief under section 6015(f), it will weigh against the grant of such relief under the balancing

³⁴⁹ See Susan R. Paisner, *Five Myths About Domestic Violence*, WASH. POST (Feb. 23, 2018), https://www.washingtonpost.com/outlook/five-myths/five-myths-about-domestic-violence/2018/02/23/78969748-1819-11e8-b681-2d4d462a1921_story.html?utm_term=.c351d5c11caf [https://perma.cc/4LNK-PBEM].

³⁵⁰ See Clarke Study, *supra* note 198, at 844.

³⁵¹ See *id.*

³⁵² *O'Neil v. Comm'r*, 104 T.C.M. (CCH) 724, 730 (2012).

³⁵³ See Clarke Study, *supra* note 198, at 844 (describing the holding as “narrow”); Peter J. Reilly, *Tax Court Not Quick to Find Abuse in Innocent Spouse Case*, FORBES (Dec. 18, 2012), <https://www.forbes.com/sites/peterjreilly/2012/12/18/tax-court-not-quick-to-find-abuse-in-innocent-spouse-case/#2e0c3c33c0b6> [https://perma.cc/LJ3E-TM7U].

³⁵⁴ *O'Neil*, 104 T.C.M. (CCH) at 733.

³⁵⁵ Reilly, *supra* note 353.

³⁵⁶ See e.g., *Coercive Control*, in *ENCYCLOPEDIA OF DOMESTIC VIOLENCE* 166, 169 (Nicky Ali Jackson ed., 2007).

³⁵⁷ Clarke Study, *supra* note 198, at 837 (citing Rev. Proc. 2003-61, 2003-2 I.R.B. 296, 298).

³⁵⁸ I.R.C. § 6015(c)(3)(A) (2012).

test of Revenue Procedure 2003-61.³⁵⁹ In fact, marital status has proven determinative.³⁶⁰

In terms of considering when to file, scholars have noted that abuse often continues after the marriage has ended.³⁶¹ For example, joint custody provides an abuser with an opportunity to continue to exert power and control over a victim.³⁶² In light of this phenomenon, it must be acknowledged that some wives will avoid filing for innocent spouse relief even after separation or divorce because they fear retaliation.³⁶³ As a result, some women choose to postpone filing for innocent spouse relief until after their abuser dies.³⁶⁴

Another related obstacle is the question among Tax Court judges why women do not allege domestic violence in divorce proceedings or on the innocent spouse request forms, choosing instead to wait until the case is before the IRS or Tax Court.³⁶⁵ This causes judges to suspect that the wife is lying about or embellishing the abuse.³⁶⁶ However, they fail to realize that oftentimes the women do not disclose the abuse earlier out of fear or because of the “legal repercussions.”³⁶⁷ For example, the presence of children in the marriage may affect whether the wife will allege domestic violence in a divorce proceeding.³⁶⁸ Moreover, scholars have noted that many victims of domestic violence are unable to perceive how dire the situation is, and these women are often caught in denial and secrecy.³⁶⁹ As a result, some women who have been abused will

³⁵⁹ *Id.* § 6015(f).

³⁶⁰ See Clarke Study, *supra* note 198, at 838 (illustrating this with a table entitled “Marital Status of Those Seeking Relief”).

³⁶¹ See Clarke Study, *supra* note 198, at 839, 839 n.84. Orly Rachmilovitz, *Bringing down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 501 (2008) (explaining that even after the relationship has ended, the abuser continues to assert control over the victim through available access); Lauren A. Kent, Comment, *Addressing the Impact of Domestic Violence on Children: Alternatives to Laws Criminalizing the Commission of Domestic Violence in the Presence of a Child*, 2001 WIS. L. REV. 1337, 1364 (2001) (contending that joint custody allows abusers repeated access to victims and a means of exerting continued control).

³⁶² See *id.* at 839.

³⁶³ See *id.* at 839–40.

³⁶⁴ See *id.* (explaining that widow status serves as a type of safeguard against retaliation but also noting that only 30% of women widowed at the time of filing secured innocent spouse relief).

³⁶⁵ *Id.* at 855.

³⁶⁶ *Id.*

³⁶⁷ Clarke Study, *supra* note 198, at 855.

³⁶⁸ See *id.* at 848, 855 (listing other factors that should be considered, including “(1) the length of time between legal proceedings where abuse was not alleged and the current innocent spouse case, (2) whether the non-requesting spouse resides in close proximity to the victim or whether he has relocated, [and] (3) whether the victim and abuser are in new personal relationships”).

³⁶⁹ See *id.* at 856, 856 n.164.

need time to realize that they were subject to abuse.³⁷⁰ Such wives should not be punished for delaying in making an abuse claim.

Again, behavior in the family law context could inform the tax context. For instance, family mediators and family law judges often do not have proper insight into domestic abuse, and as a result, alleged abusers are frequently awarded sole or joint custody of children.³⁷¹ They suffer from the same reliance on stereotypes as Tax Court judges attempting to parse through abuse allegations.³⁷² Here again, unreasonable behavior on the part of the noncompliant spouse in terms of custody mediation or time share plans should signal to the Tax Court that abuse allegations should be more fully considered in determining whether to grant innocent spouse relief.³⁷³

3. *Correlation Between Abuse Claims & Innocent Spouse Relief*

Tax practitioners are correct in determining there is a correlation between a Tax Court judge's upholding an abuse claim and granting innocent spouse relief.³⁷⁴ In fact, the Clarke Study showed that in 90% of cases where abuse was judicially determined, equitable relief under section 6015(f) was granted.³⁷⁵ The problem is that Tax Court judges who are often unfamiliar with domestic abuse do not have a definition of abuse and have been given a non-exhaustive list of factors to consult.³⁷⁶ Regarding the first issue, the only guidance Tax Court judges have in terms of defining abuse is provided in Revenue Procedure 2003-61.³⁷⁷ It requires that the wife have been a victim of abuse prior to signing the return and that given the abuse, she was afraid that refusing to sign the return would result in retaliation.³⁷⁸ There is really no definition provided at all.

³⁷⁰ See *id.* at 856.

³⁷¹ See *id.* at 841, 841 n.97. Joan Zorza, *How Abused Women Can Use the Law to Help Protect Their Children*, in END THE CYCLE OF VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN 147, 147–69 (Einat Peled et al. eds., 1995); Arny Levin & Linda G. Mills, *Fighting for Child Custody When Domestic Violence Is at Issue: Survey of State Laws*, 48 SOC. WORK 463 (2003) (concluding that judges award batterers joint and sole custody and often believe women are falsely alleging domestic violence to gain an advantage in terms of custody proceedings); see also M.B. Liss et al., *Domestic Violence and Child Custody*, in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 181, 181–83 (Marsali Hansen & Michèle Harway eds., 1993).

³⁷² See *id.* at 841.

³⁷³ See Clarke Study, *supra* note 198, at 841.

³⁷⁴ See *id.* at 846; see also *Aiding Innocent Spouses from Joint Tax Liabilities*, YOURABA (Sept. 2011) (on file with the *Ohio State Law Journal*) (discussing the difficulties of obtaining innocent spouse relief).

³⁷⁵ See Clarke Study, *supra* note 198, at 846.

³⁷⁶ See *id.*

³⁷⁷ See *id.* at 846–47 (citing Rev. Proc. 2003-61, 2003-2 C.B. 296).

³⁷⁸ *Id.*

4. Problematic Corroboration Requirement

Judicial interpretation of Revenue Ruling 2003-61 has made it more difficult for victims to secure a finding of abuse.³⁷⁹ The Tax Court's further requirement that abuse be corroborated further shows that judges do not understand the nature of the abuse.³⁸⁰ In terms of physical abuse, even the presence or absence of police reports has not proven dispositive.³⁸¹ Compounding the problem is the perception of domestic violence as a "private matter" by both police officers and judges.³⁸² Domestic violence is common and under-reported.³⁸³ According to a 2003 study, only 14.5% of serious assaults lead to police reporting.³⁸⁴ Many women choose not to report domestic violence because they are afraid of retaliation, endangerment to children, and public ridicule.³⁸⁵

Tax Court judges' additional requirement that a claim of abuse be corroborated before it can weigh in favor of a grant of relief is particularly problematic in the context of non-physical abuse.³⁸⁶ However, even when victims have provided third party testimony of verbal and mental abuse, Tax Court judges have dismissed this form of corroboration as inadequate, and their rulings have been inconsistent.³⁸⁷ For example in *Collier v. Commissioner*, the wife called a friend to testify about her husband's verbal onslaughts that she had

³⁷⁹ See *id.* at 848 (discussing corroboration requirements).

³⁸⁰ See *id.*

³⁸¹ See, e.g., *McKnight v. Comm'r*, 92 T.C.M. (CCH) 76, 81 (2006) (finding that the abuse had been corroborated despite the lack of criminal charges brought or medical attention sought where the police were called to the home on two occasions due to violent attacks); cf. e.g., *Sotuyo v. Comm'r*, No. 25692-10S, 2012 WL 1021306, at *5 (T.C. Mar. 27, 2012) (dismissing an abuse claim corroborated by a police report and concluding the behavior did not rise to the level that would have made the wife sign a return that omitted income out of fear); *Ladehoff v. Comm'r*, No. 16814-10S, 2012 WL 612501, at *3 (T.C. Feb. 27, 2012) (finding the same in the context of a husband's request for innocent spouse relief where two police reports had been filed).

³⁸² KRISTIN A. KELLY, DOMESTIC VIOLENCE AND THE POLITICS OF PRIVACY 3 (2003).

³⁸³ See Clarke Study, *supra* note 198, at 848 (citing SHANNAN M. CATALANO, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2003 1 (2004) (finding only 48% of all violent victimizations are reported)).

³⁸⁴ See KELLY, *supra* note 382, at 3.

³⁸⁵ See Clarke Study, *supra* note 198, at 848 (citing Barbara R. Borreno, *In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims*, 64 VAND. L. REV. 225, 243 (2011)) (revealing the perception of domestic violence as a "hidden problem" involving "invisible" victims that tend not to tell others about the abuse due to a number of reasons, including fear and shame).

³⁸⁶ See *id.* at 847 (citing *Pullins v. Comm'r*, 136 T.C. 432, 454 (2011); *Venables v. Comm'r*, No. 22068-08S, 2010 WL 1980316, at *7 (T.C. May 18, 2010); *Bruen v. Comm'r*, 98 T.C.M. (CCH) 400, 401-06 (2009); *Fox v. Comm'r*, 91 T.C.M. (CCH) 731, 734 (2006); *Bright v. Comm'r*, No. 3839-04S, 2005 WL 2444050, at *6 (T.C. Oct. 4, 2005); *Rooks v. Comm'r*, No. 11874-02S, 2003 WL 21350037, at *4 (T.C. June 11, 2003)).

³⁸⁷ See *Collier v. Comm'r*, 83 T.C.M. (CCH) 1799, 1809 (2002).

witnessed as well as a psychologist she had seen for depression.³⁸⁸ Nevertheless, the Tax Court was dismissive of her friend's testimony, characterizing it as conclusory and similarly found that the psychologist's testimony was insufficient to establish abuse.³⁸⁹

In contrast, the Tax Court held in *Chadwick v. Commissioner* that the wife's testimony alone was adequate to establish that she had been abused during the marriage.³⁹⁰ Similarly, in *Thomassen v. Commissioner*, a judge upheld an abuse claim where children and family friends testified as to the presence of abuse.³⁹¹

The corroboration requirement prevents wives of high-net-worth tax evaders from securing relief even if they have been abused. Most wives seeking innocent spouse relief will not have protection orders and police reports that they can introduce during a trial.³⁹² In addition, many wives will not have third parties who can testify as to the abuse³⁹³ because one of the tactics of an abuser is to isolate the victim to engender co-dependence and to cut off the victim from available help.³⁹⁴ Finally, many wives will not check the box indicating abuse on Innocent Spouse Relief Request Form 8857 because the IRS is mandated to contact their husbands even where domestic violence is at issue.³⁹⁵ While the wife's information is protected during the IRS review of the request, if she appeals a denial to the Tax Court, all of the information listed on the form becomes discoverable.³⁹⁶ The key to resolving this problem is affording proper weight to provable financial abuse.

5. Financial Abuse Mitigates "Knowledge"

Tax Court judges have been extremely reluctant to uphold abuse claims where non-physical abuse has been alleged.³⁹⁷ At the same time, the current

³⁸⁸ See *id.*

³⁸⁹ See *id.*

³⁹⁰ See *Chadwick v. Comm'r*, No. 4991-04S, 2005 WL 2649124, at *18 (T.C. Oct. 17, 2005).

³⁹¹ See *Thomassen v. Comm'r*, 101 T.C.M. (CCH) 1397, 1409 (2011).

³⁹² See *Clarke Study*, *supra* note 198, at 849.

³⁹³ See *id.*

³⁹⁴ See *Coercive Control*, *supra* note 356, at 169.

³⁹⁵ See *Clark Study*, *supra* note 198, at 849–850. The IRS does not reveal personal information to protect the requesting spouse. *Id.* at 850 n.132 (citing *IRS Innocent Spouse Questions and Answers*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/innocent-spouse-questions-and-answers> [<https://perma.cc/T2GN-DFQJ>]).

³⁹⁶ See *id.* at 850, 850 n.133 (explaining that if there is an appeal, protected information becomes discovery; however, Tax Court Rule 27 (d)(1) does permit the requesting spouse to request a protective order that would require redaction).

³⁹⁷ See, e.g., *Nihiser v. Comm'r*, 95 T.C.M. (CCH) 1531, 1536–37 (2008) (characterizing nonphysical abuse as “easily exaggerate[d]” where the wife alleged verbal abuse from her husband who was suffering from drug addiction). This was the first time that a Tax Court recognized “objective indications” of abuse that did not involve physical

regulations do not address whether financial control constitutes circumstantial evidence of abuse.³⁹⁸ Perhaps most relevantly for this Article, Clarke argues that financial abuse should serve as a lens through which to view the other factors in Revenue Ruling 2003-61, such as the “knowledge or reason to know” factor.³⁹⁹

The “knowledge or reason to know” factor means that a requesting spouse “did not know and had no reason to know of the item giving rise to the deficiency.”⁴⁰⁰ As discussed earlier, “actual knowledge” that money was received often disqualifies wives in the section 6015(c) context as well.⁴⁰¹ Clarke emphasizes that financial abuse, along with allegations of other types of abuse, should be enough for a requesting spouse “to be successful on this knowledge factor.”⁴⁰² Logically, if the domestic violence victim lacks information about the family’s finances and is subject to abuse whenever she asks, she should be deemed not to have knowledge or reason to know of the item and therefore granted relief.⁴⁰³ This is even more so true in the context of a wife hiring a team of forensic accountants during a divorce proceeding. Unfortunately, the newly proposed regulations of 2012 do not incorporate this line of reasoning and the rationale.⁴⁰⁴

There are issues surrounding financial abuse and in particular, whether it could mitigate the “knowledge” factor in determining whether relief is merited.⁴⁰⁵ Many times, victims are not aware of tax and other financial affairs because the noncompliant spouse exerts control over the information.⁴⁰⁶ This is even more so the case in the specific types of divorces discussed. Again, if the wife had access to financial information, she would not need to hire a team of forensic accountants or attempt to use family law proceeding discovery motions to unearth information. Fortunately, at times, Tax Court judges have upheld mental and emotional abuse claims where extreme financial control is shown.⁴⁰⁷ For example, in *Bishop v. Commissioner*, the wife was prohibited from accessing the couple’s bank accounts.⁴⁰⁸ Notably, there was no allegation of physical abuse.⁴⁰⁹ Her request for innocent spouse relief was granted.⁴¹⁰

However, the Tax Court’s rulings where financial abuse is alleged have not been consistent. Prior to *Bishop*, the Tax Court denied a nurse’s request for

violence, such as isolation, threatening suicide, substance abuse, and degrading the victim, among others. See Clarke Study, *supra* note 198, at 852.

³⁹⁸ Clarke Study, *supra* note 198, at 854.

³⁹⁹ See *id.* at 855.

⁴⁰⁰ See *id.* at 855 (quoting Rev. Proc. 2003-61, 2003-2 C.B. 296).

⁴⁰¹ See, e.g., *Cheshire v. Comm’r*, 282 F.3d 326, 336 (5th Cir. 2002).

⁴⁰² Clarke Study, *supra* note 198, at 855.

⁴⁰³ See *id.*

⁴⁰⁴ See *id.* at 854.

⁴⁰⁵ See *id.* at 832.

⁴⁰⁶ *Id.* at 852.

⁴⁰⁷ *Bishop v. Comm’r*, No. 7595-06S, 2008 WL 852028, at *8 (T.C. Mar. 31, 2008).

⁴⁰⁸ *Id.* at *2.

⁴⁰⁹ *Id.* at *4.

⁴¹⁰ *Id.* at *8.

relief, finding that given her education she could not have been “oblivious” to the family’s finances.⁴¹¹ Given that wives may readily prove financial abuse and the attendant difficulties with proving physical abuse, the Tax Court’s hesitancy in recognizing the former is distressing.⁴¹² Greater judicial recognition of financial abuse is the key to providing more abuse victims with appropriate relief in this context.⁴¹³

Notably, in January 2012, the IRS issued a proposed revenue procedure that would modify IRS review of innocent spouse relief requests, particularly in regard to abuse.⁴¹⁴ In other words, it would supplant Rev. Proc. 2003-61, 2003-32 I.R.B. 296.⁴¹⁵ As detailed in Notice 2012-8, the proposed regulation would address how abuse could influence a spouse’s reluctance to challenge false or fraudulent statements on a tax return.⁴¹⁶ Although the proposed regulation is a step forward in confronting some of the problems plaguing wives seeking innocent spouse relief, additional guidance is necessary given the current inadequacies discussed herein.⁴¹⁷ For example, as stated above, most domestic violence victims do not have the police reports and protective orders that Tax Court judges require to make a finding of abuse.⁴¹⁸ Moreover, the judges do not have clear criteria for making a determination on the issue of abuse.⁴¹⁹

E. *Remaining Issues*

At the same time, there is a potential for abuse in modifying innocent spouse relief in the manner proposed. For example, a “not so innocent spouse” who actually knew about offshore accounts/assets and the failure to report, may be allowed to keep the luxuries afforded by a violation of the law.⁴²⁰ Undeniably, some spouses likely would collude together to use innocent spouse relief to reduce their tax liability.⁴²¹ At the same time, former spouses may use innocent spouse relief to escape tax liability while also punishing their former spouse.⁴²²

In thinking about possible expansion, one must consider the current system and the current scholarly landscape in terms of reform. The current system, most recently modified in January 2012 by the Treasury Department, already

⁴¹¹ Smith v. Comm’r, 82 T.C.M. (CCH) 963, 967 (2001).

⁴¹² See Clarke Study, *supra* note 198, at 853.

⁴¹³ *Id.*

⁴¹⁴ See *id.* at 853–854 (discussing I.R.S. Notice 2012-8, 2012-4 I.R.B. 309).

⁴¹⁵ See *id.* at 854.

⁴¹⁶ See *id.*

⁴¹⁷ See *id.*

⁴¹⁸ See *id.*

⁴¹⁹ *Id.*

⁴²⁰ See McMahon, *supra* note 162, at 145.

⁴²¹ See *id.* at 144 n.15 (noting that it is impossible to anticipate the frequency of this behavior, but explaining that the 1948 inception of the income-splitting joint return was in response to Congress’s perceived collusive income shifting).

⁴²² See *id.* at 144–45.

absolves spouses who were not coerced but who chose to sign returns.⁴²³ Generally, such spouses have benefited from paying less tax due to the filing of a false return.⁴²⁴

However, a particularly important general distinction may be drawn in the case of wives of noncompliant spouses. It is likely that these wives have not benefited substantially from the filing of false or fraudulent returns because the noncompliant spouses likely also committed financial abuse and reinvested the hidden assets into other offshore ventures.⁴²⁵ After all, if the wife of a noncompliant spouse was benefiting substantially from the offshore funds, she may have become alerted to their presence.⁴²⁶ The wives discussed in this Article have remained largely in the dark about their husband's offshore finances, necessitating the hiring of teams of forensic accountants.

Some of the viewpoints on innocent spouse relief do not adequately reflect wives' agency.⁴²⁷ While scholars agree that feminist theory cannot provide a clear direction for tax policy, it is a vital aspect to any discussion of innocent spouse relief.⁴²⁸ There is no uniform feminist position regarding most tax issues.⁴²⁹ The main reason for the lack of consensus is that liberal feminists contend for equality between the sexes while cultural feminists contend there are inherent differences between women and men.⁴³⁰ There are shifting viewpoints between protectionist and equality models that inform the debate.⁴³¹ A related paradox is how women could be equal in terms of the law but still disadvantaged when compared to men.⁴³² McMahon argues that an expansion of innocent spouse relief may have the ill effect of further "reinforcing wives' vulnerability."⁴³³ However, this Article takes the view that expanding innocent spouse relief, particularly in cases of financial and other domestic abuse, will

⁴²³ See Rev. Proc. 2013-34, 2013-43 I.R.B. 397.

⁴²⁴ McMahon, *supra* note 162, at 145.

⁴²⁵ McCarden, *supra* note 29, at 28-29.

⁴²⁶ See *id.*

⁴²⁷ McMahon, *supra* note 162, at 145 n.17. As McMahon points out, gendered implications associated with innocent spouse relief are more complicated because same-sex couples can file joint returns. *Id.* at 145. This Article also does not address this additional dimension.

⁴²⁸ See Anne Alstott, *Tax Policy and Feminism*, 96 COLUM. L. REV. 2001, 2003 (1996).

⁴²⁹ See *id.* (discussing the proposition that feminists disagree on policy ideas and objectives); McMahon, *supra* note 162, at 145 (discussing how a single feminist theory on tax policy is impossible because of conflicting ideas); see, e.g., Patricia Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805 (2008).

⁴³⁰ McMahon, *supra* note 162, at 145-146; see Martha Albertson Fineman, *Grappling with Equality: One Feminist Journey*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 47, 49-50 (Martha Albertson Fineman ed., 2011).

⁴³¹ See Fineman, *supra* note 430, at 50.

⁴³² See McMahon, *supra* note 162, at 146. See generally MARTHA ALBERSTON FINEMAN, *THE AUTONOMY MYTH* (2004).

⁴³³ See McMahon, *supra* note 162, at 168-74 (discussing whether innocent spouse relief hurts wives although it was enacted to help them).

empower women to report the offshore tax and other misdeeds of their noncompliant spouses.

Domestic abuse is an area that the United States as a whole is just beginning to understand.⁴³⁴ Tax Court judges and tax practitioners do not normally deal with domestic abuse.⁴³⁵ The U.S. Department of the Treasury, the IRS, and many Tax Court judges have acknowledged that they are not familiar with the complexities of domestic violence.⁴³⁶ Reform must occur so that victims of domestic violence may obtain equitable relief under section 6015(f) or relief under section 6015(c) even if a Tax Court judge is unfamiliar with domestic violence.⁴³⁷ One way this may happen is through permitting financial abuse, coupled with other forms of abuse, to satisfy the “knowledge factor.” The underlying rationale for doing so makes sense.

IV. WIVES AS OFFSHORE WHISTLEBLOWERS DURING DIVORCE

The government has two primary ways of discovering tax noncompliance under current law.⁴³⁸ The main way is through governmental examination power, which enables the government to audit taxpayers’ returns and then reach a conclusion as to whether such returns comply with the law.⁴³⁹ The second way is through using whistleblowers who may serve as a “tool for peeking inside the otherwise private zone of voluntary compliance.”⁴⁴⁰ The government and the IRS lack the resources to investigate privately the immense amount of offshore tax evasion in the United States.⁴⁴¹ Thus, we should encourage wives who have uncovered information regarding offshore tax cheating during divorce to whistle blow.⁴⁴² A system for doing so must take into account necessary protections in light of the risks posed, especially where abuse has been a factor.⁴⁴³

⁴³⁴ See Clarke Study, *supra* note 198, at 856.

⁴³⁵ See *id.*

⁴³⁶ See *id.*

⁴³⁷ See *id.*

⁴³⁸ See *infra* notes 439–440 and accompanying text.

⁴³⁹ I.R.C. § 7602(a) (2012); see also Edward A. Morse, *Whistleblowers and Tax Enforcement: Using Inside Information to Close the “Tax Gap,”* 24 AKRON TAX J. 1, 2 (2009).

⁴⁴⁰ See Morse, *supra*, note 439, at 3. The term “whistleblower” comes from the act of unarmed British bobbies blowing a whistle to alert other officers of a crime. *Winters v. Hous. Chronicle Pub. Co.*, 795 S.W.2d 723, 727 (Tex. 1990) (Doggett, J., concurring) (citing CHARLES PETERS & TAYLOR BRANCH, *BLOWING THE WHISTLE* 18 (Charles Peters & Taylor Branch eds., 1972)).

⁴⁴¹ See Jesse Eisinger & Paul Kiel, *I.R.S. Tax Fraud Cases Plummet After Budget Cuts*, N.Y. TIMES (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/business/economy/irs-tax-fraud-audit.html> [on file with the *Ohio State Law Journal*] (discussing a decrease in tax fraud cases due to lack of funds).

⁴⁴² See *infra* Part III.B.

⁴⁴³ See *id.*

Empowering wives to whistle blow will have exponential effects as partners and business associates of noncompliant spouses also will be identified.⁴⁴⁴

A. IRS Whistleblower Program

Since 1867, the IRS has had the authority to pay monetary awards to whistleblowers who report tax frauds and evaders.⁴⁴⁵ The initial IRS Whistleblowing Program under I.R.C. § 7623 was ineffective due to its decentralized management, inadequate oversight, and restriction to only discretionary awards.⁴⁴⁶ In 2006, these shortcomings resulted in Congress' amending the program to incentivize potential whistleblowers to report tax fraud and evasion.⁴⁴⁷ I.R.C. § 7623 has been interpreted as providing the IRS with broad discretion in terms of determining and paying whistleblower awards.⁴⁴⁸ Prior to 2006, the IRS gave a minimum award of 1% and a maximum award of 15% of amounts recovered, which was capped at \$2 million.⁴⁴⁹ Whistleblowers had no right to appeal award decisions, and there were no advertisements for the program.⁴⁵⁰ Moreover, IRS employees could not seek out potential whistleblowers.⁴⁵¹

Congress amended section 7623 with section 406 of the Tax Relief and Health Care Act of 2006.⁴⁵² A major aim of the amendments was to encourage whistleblowers to report tax fraud and evasion and thereby raise revenue for the government.⁴⁵³ A significant change was the increase in the amount of

⁴⁴⁴ *See id.*

⁴⁴⁵ Dennis J. Ventry, Jr., *Whistleblowers and Qui Tam for Tax*, 61 TAX LAW. 357, 381–82 (2008) (noting a 15% to 20% increase in the tax whistleblower bar since the passage of the 2006 amendments).

⁴⁴⁶ Ashlin Aldinger, *A Race to the IRS: Are Snitches and Criminals the New Business Model?*, 51 HOUS. L. REV. 913, 923 (2014) (noting some of the drawbacks to the initial whistleblower program).

⁴⁴⁷ Ventry, *supra* note 445, at 362–64 (discussing monetary incentives for whistleblowers).

⁴⁴⁸ Aldinger, *supra* note 446, at 924.

⁴⁴⁹ *See id.*

⁴⁵⁰ *See* Michelle M. Kwon, *Whistling Dixie About the IRS Whistleblower Program Thanks to the IRC Confidentiality Restrictions*, 29 VA. TAX REV. 447, 453 (2010) (noting that before the 2006 amendment, whistleblowers had no right to judicial appeals).

⁴⁵¹ *Id.*

⁴⁵² Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406, 120 Stat. 2922, 2958-60 (2006).

⁴⁵³ Prior section 7623 was renamed section 7623(a). The main amendment was the addition of subsection (b). Pursuant to subsection (b), whistleblower awards are now mandated at a minimum of 15% of the amount collected, including, inter alia, any attendant penalties and interest as a result of an IRS initiated action. The maximum award is now 30% of such proceeds. Section 7623(a) now longer includes the nominal cap under prior law. I.R.C. § 7623 (2012). Notably, whistleblower claims under § 7623(b) are appealable whereas those under the prior 2006 amendment, i.e., § 7623(a) are not. I.R.C. § 7623(b)(4) (2012); I.R.S. Notice 2008-4 I.R.B. 254 (Jan. 14, 2008), <https://www.irs.gov/pub/irs-irbs/irb08->

whistleblower awards.⁴⁵⁴ Congress made this step in order to decrease the tax gap, i.e., “the difference between what taxpayers owe and the amount timely paid.”⁴⁵⁵ The tax gap is a result of the voluntary compliance aspect of our federal income tax system.⁴⁵⁶ It is no secret that the IRS uses the whistleblower program to raise revenue.⁴⁵⁷ In 2015, missing tax revenue totaled at least \$450 billion.⁴⁵⁸ Most of this amount is due to unreported taxes.⁴⁵⁹

The requirements for a whistleblower award are straightforward under the current law.⁴⁶⁰ There are three main requirements: (1) the whistleblower discloses information regarding tax noncompliance dealing with over \$2 million;⁴⁶¹ (2) this information “substantially contributes” to the IRS’s filing an administrative or judicial action;⁴⁶² and (3) the IRS collects funds due to an action or settlement.⁴⁶³ The IRS may deny a claim if it already has the information the whistleblower provided, there is no finding of liability, or the

02.pdf, [https://perma.cc/9U4X-YTKZ] (“[T]here is no right to appeal to the Tax Court for claims under § 7623(a).”); see also *Dacosta v. United States*, 82 Fed. Cl. 549, 555 (2008) (explaining that § 7623(b) claims are adjudicated in Tax Court). Section 7623(b) claims may only be appealed in the IRS establishes an administrative or judicial claim. The IRS must go forward with “administrative or judicial action” for a right to appeal to exist. I.R.C. § 7623(b)(1) (2012); see also INTERNAL REVENUE SERV., FISCAL YEAR 2012 REPORT TO THE CONGRESS ON THE USE OF SECTION 7623, at 1 (2012) [hereinafter *Fiscal Year 2012 Report*], https://www.irs.gov/pub/whistleblower/2012%20IRS%20Annual%20Whistleblower%20Report%20to%20Congress_mv.pdf [https://perma.cc/5YJK-YSFX] (“The primary purpose of the Act was to encourage people with knowledge of significant tax noncompliance to provide information to the IRS.”); see also TREASURY INSPECTOR GEN. FOR TAX ADMIN., DEFICIENCIES EXIST IN THE CONTROL AND TIMELY RESOLUTION OF WHISTLEBLOWER CLAIMS 2 (2009) (explaining that the purpose of the 2006 amendments was to raise billions of dollars in revenue).

⁴⁵⁴ Aldinger, *supra* note 446, at 927.

⁴⁵⁵ *Id.* at 926.

⁴⁵⁶ See U.S. DEP’T OF THE TREASURY, UPDATE ON REDUCING THE FEDERAL TAX GAP AND IMPROVING VOLUNTARY COMPLIANCE 5, 31 (2009), http://www.irs.gov/pub/newsroom/tax_gap_report_final_version.pdf, [https://perma.cc/T4GX-8WZK]; see also Bret Wells, *Voluntary Compliance: “This Return Might Be Correct but Probably Isn’t,”* 29 VA. TAX REV. 645, 647–51 (2010).

⁴⁵⁷ See Karie Davis-Nozemack & Sarah J. Webber, *Lost Opportunities: The Underuse of Tax Whistleblowers*, 67 ADMIN. L. REV. 321, 324–26 (2015).

⁴⁵⁸ See *Review of the President’s Fiscal Year 2015 Funding Request for the Department of the Treasury and the Internal Revenue Service: Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov’t of the S. Comm. on Appropriations*, 113th Cong. 23 (2014) (statement of J. Russell George, Treasury Inspector General for Tax Administration).

⁴⁵⁹ See *id.* (finding that the \$376 billion or approximately 84% of the total tax gap is due to unreported taxes); see also Davis-Nozemack & Webber, *supra* note 457, at 367.

⁴⁶⁰ See *infra* notes 461–462 and accompanying text.

⁴⁶¹ I.R.C. § 7623(b)(5) (2012).

⁴⁶² *Id.* § 7623(b).

⁴⁶³ See *Fiscal Year 2012 Report*, *supra*, note 453, at 3.

taxpayer is judgment proof.⁴⁶⁴ Additionally, a whistleblower may not receive an award if found to be part of the planning or instigation of the tax scheme.⁴⁶⁵ While the amendments to the IRS Whistleblower Program have resulted in more reporting, it does not appear that high quality leads have been reported.⁴⁶⁶ This Article addresses how the revamped IRS Whistleblower Program may be used to reduce the international tax gap through the reporting of wives in high-net-worth divorce proceedings described in Part I.

The tax whistleblower program under I.R.C. § 7623 has been criticized frequently over the last several years.⁴⁶⁷ In 2006, Congress revised the whistleblower program in connection with the Tax Relief and Health Care Act of 2006.⁴⁶⁸ However, counsel for potential whistleblowers have emphasized several continued shortcomings of the program.⁴⁶⁹ At least one of these shortcomings is not relevant to the wives that are subject to this Article.⁴⁷⁰

The IRS Whistleblower Program is an under-utilized resource for several reasons.⁴⁷¹ Some scholars have chosen to place the blame squarely at the IRS's feet, noting its woeful underutilization of whistleblowers.⁴⁷² While most legal scholarship on whistleblower programs takes as a premise the ability of the agency to use effectively a tip, this assumption has been challenged in at least

⁴⁶⁴ See Kwon, *supra* note 450, at 466–67; Confidentiality and Disclosure for Whistleblowers, INTERNAL REVENUE SERV. (Mar. 7, 2013), <http://www.irs.gov/uac/Confidentiality-and-Disclosure-for-Whistleblowers>, [<https://perma.cc/U4FV-FCZR>].

⁴⁶⁵ I.R.C. § 7623(b)(3).

⁴⁶⁶ Aldinger, *supra* note 446, at 928 (noting that although there were 377 submissions in fiscal year 2008, many of these did not result in claims).

⁴⁶⁷ See Kwon, *supra* note 450, at 488 (calling the 2006 amendment an “empty promise”); Stephen W. Carman, Note, *More Cheese for the Rats: Tax Court and Congress Give Big Win to Whistleblowers with Broad Definition of “Proceeds,”* 83 MO. L. REV. 155, 165 (2018) (“[D]espite its lofty goals, the new whistleblower program has failed to fully deliver as promised.”).

⁴⁶⁸ Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406, 120 Stat. 2922, 2958-60 (2006).

⁴⁶⁹ Aldinger, *supra* note 446, at 929.

⁴⁷⁰ Although Code § 6103(n) provides for an exception to the usual prohibitions against disclosing tax return information, the IRS has refused to enter into information-sharing contracts with whistleblowers. As a result, whistleblowers are denied access to financial records. Providing whistleblowers with such access raises serious privacy concerns. See I.R.C. § 6103(n) (2012); see also Aldinger, *supra* note 446, at 925. However, in the case of a wife in divorce proceedings, she will have access to the joint returns even if she must subpoena them from the IRS.

⁴⁷¹ See Davis-Nozemack & Webber, *supra* note 457, at 322 (explaining that despite receiving over 9,000 tips from whistleblowers in 2014 and having a backlog of over 22,000, the IRS has only paid out approximately 100 awards each year in fiscal years 2009-2014 and inquiring “why has the Service capitalized on so few tips?”).

⁴⁷² *Id.* at 323 (“Simply put, the Service does not seek all available information and assistance from whistleblowers.”); see also *id.* at 341 (discussing Service executive’s attempts in 2012 and 2014 to address the debriefing process for whistleblowers which also ultimately left Service employees with inadequate guidance).

the tax arena.⁴⁷³ Although there are similarities between the amended IRS Whistleblower Program and the False Claims Act *qui tam* actions, there are significant differences between the two.⁴⁷⁴ These differences have spurred some scholars to consider whether the IRS should also allow for a *qui tam* action.⁴⁷⁵ Currently, there is not a *qui tam* action available for tax reporters.⁴⁷⁶

B. Empowering Wives to Report Offshore Tax Evasion

Whistleblowing has been perceived as disconcerting and even morally reprehensible since at first glance it may appear to rely upon “bad blood” such as that associated with “office politics or a divorce.”⁴⁷⁷ One scholar states there are “serious moral issues” with rewarding individuals for telling on other’s tax noncompliance.⁴⁷⁸ However, in the circumstance of a noncompliant spouse acting wrongfully in the family law and tax contexts, this condemnation of whistleblowing is not justified.⁴⁷⁹

In arguing for a repeal of the Whistleblower Program during the Congressional debate of the 1998 Internal Revenue Service Restructuring and Reform Act, Senator Harry Reid characterized the Whistleblower program as the “Reward for Rats” program and denounced it as the “Snitch Program.”⁴⁸⁰ Specifically, Senator Reid noted giving money to “snitches” to report their “associates, employers, relatives, and [ex-spouses]” [was] “unseemly, distasteful, and just wrong.”⁴⁸¹ Nevertheless, as explained above, just eight years later, Congress decided to expand the program in 2006.⁴⁸² Regardless of the perceived moral pitfalls, the program has survived because it does result in leads regarding tax evasion and fraud, which enhances tax enforcement efforts thereby tightening the tax gap.⁴⁸³

⁴⁷³ *Id.* at 324 (stating that the authors challenge this basic premise and then suggest improvements by referencing “Fourth Amendment jurisprudence, taxpayer privacy law, and whistleblower and tax enforcement literature.”).

⁴⁷⁴ Franziska Hertel, *Qui Tam for Tax: Lessons from the States*, 113 COLUM. L. REV. 1897, 1925–29 (2013) (analyzing the benefits of a *qui tam* action).

⁴⁷⁵ *Id.* at 1897–1898 (explaining that tax fraud is expressly excluded from *qui tam* actions).

⁴⁷⁶ *Id.*

⁴⁷⁷ See Victor Fleischer, *A Strategy of Tattletales at the I.R.S.*, N.Y. TIMES (Sept. 20, 2012), http://dealbook.nytimes.com/2012/09/20/a-strategy-of-tattletales-at-the-i-r-s/?_r=0, [on file with the *Ohio State Law Journal*] (discussing the whistleblower program’s reliance on conflict to bring information to the government’s attention).

⁴⁷⁸ Aldinger, *supra* note 446, at 931.

⁴⁷⁹ See *infra* notes 485–501 and accompanying text.

⁴⁸⁰ Aldinger, *supra* note 446, at 932.

⁴⁸¹ *Id.*

⁴⁸² See *supra* notes 452–458.

⁴⁸³ See Marsha Ferziger & Daniel Currell, *Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs*, 1999 U. ILL. L. REV. 1141, 1143 (2000) (explaining that bounty programs result in tips that the government would not otherwise have).

This Article contends that in the divorce context presented, i.e., where a husband is showing a flagrant disregard for discovery in a family law proceeding and for tax reporting, whistleblowing should be viewed as a necessary tool for shedding light onto darkness. This is especially just when one considers the likelihood that at least financial abuse may have also been present in the marriage.⁴⁸⁴ Granted, one may take issue with Bradley Birkenfield's award given his involvement in criminal activity.⁴⁸⁵ However, an innocent wife who had no knowledge of her husband's tax noncompliance and who is later confronted with his overall noncompliance in terms of revealing assets during a divorce proceeding is a different story. One observer asks, "Is it not morally reprehensible to allow a criminal to become wealthy from a tax evasion scheme in which he was personally involved?"⁴⁸⁶ In contrast, a wife who is an innocent spouse has at least been determined not to have been personally involved.⁴⁸⁷ There is nothing wrong in allowing her to report tax noncompliance.

Furthermore, innocent spouses who are eligible for a whistleblower award may help to alleviate some of the needless backlog that accompanies most family law proceedings where a noncompliant spouse is the party on the other side.⁴⁸⁸ In fact, the wife may decide to stop expending funds on forensic accountants and motions to compel if she may receive a share of the marital assets through a whistleblower award. At the same time, of course, there will be wives who would prefer to keep using the family law proceedings with the hope that the marital assets would not have to be shared with the government through the rectifying of unpaid tax. However, this Article addresses the truly innocent spouse who desires to remedy the wrongs of the marriage and to move on with her life in a compliant manner.

There are of course numerous downsides to whistleblowing,⁴⁸⁹ and it is unthinkable that a wife would do so without the guarantee of innocent spouse relief. She could end up in jail if criminal prosecution of the husband is

⁴⁸⁴ See Maya Kachroo-Levine, *Financial Abuse: How to Identify It and What You Can Do to Help*, FORBES (Sept. 25, 2017), <https://www.forbes.com/sites/mayakachroolevine/2017/09/25/financial-abuse-how-to-identify-it-and-what-you-can-do-to-help/#55fcbd4f429b> [<https://perma.cc/7RC3-P7QJ>] (noting that financial abuse is present in 99% of domestic violence cases).

⁴⁸⁵ Aldinger, *supra* note 446, at 931 (suggesting that Bradley Birkenfield was only spared because of his more limited criminal involvement instead of having been "the mastermind of the tax violations" and noting that Bradley Birkenfield received the largest whistleblower award in history in 2012 in the amount of \$104 million).

⁴⁸⁶ Aldinger, *supra* note 446, at 931.

⁴⁸⁷ See *supra* Part II.B.

⁴⁸⁸ See Natalia Teper, "Sheridan Issues," LAW-RELATED REFLECTIONS (Oct. 10, 2018), <https://teperlaw.wordpress.com/2018/10/10/sheridan-issues/> [<https://perma.cc/8F5R-GAYS>] (discussing possible delays in family court stemming from tax issues).

⁴⁸⁹ The whistleblowing process is long, and the threat of retaliation is a real one. In the employment context, as Aldinger notes, whistleblowers sometimes become unemployable, and there is a high correlation between whistleblowers and bankruptcy. Aldinger, *supra* note 446, at 932.

successful or with heavy civil penalties to pay.⁴⁹⁰ If she has primary custody of the children, she will be unlikely to take such exorbitant risks without the assurance of innocent spouse relief. Unlike other tax whistleblowers, her identity would not be protected.⁴⁹¹ Just as fear of retaliation would cause some wives not to seek innocent spouse relief, it would also deter them from tax whistleblowing.⁴⁹² Unfortunately, there is no federal law prohibiting retaliation in the tax whistleblowing context.⁴⁹³

Currently, there is not much literature on why whistleblowers choose to report noncompliance.⁴⁹⁴ As one author has stated, “[t]he primary purpose of the IRS Whistleblower Program is to encourage the reporting of major tax noncompliance issues.”⁴⁹⁵ Scholars have condemned whistleblowers as also likely to have had unclean hands.⁴⁹⁶ However, the IRS has acknowledged this possibility and is comfortable with it.⁴⁹⁷ Stephen Whitlock, the first director of the IRS Whistleblower Office, specifically stated that “the law recognizes that [whistleblowers may have unclean hands], and that’s OK.”⁴⁹⁸ Similarly, in the context of innocent spouse relief, there will be times when a wife has benefited from the tax fraud or tax evasion; however, a parallel public policy rationale also justifies extending innocent spouse relief in the context examined in this Article.

What scholars do know is that factors such as “the level of moral outrage” and “the scale of the harm” motivate some whistleblowers to come forward.⁴⁹⁹ A wife who has dealt with a noncompliant spouse in a multi-year divorce proceeding and who ultimately finds out her spouse has been hiding offshore assets and accounts would be motivated by both of these factors. The usual impediments to whistleblowing could largely be overcome provided she receives innocent spouse relief. Yuval Feldman and Orly Lobel’s recent empirical study examines the legal factors that cut in favor of whistleblowing, including anti-retaliation measures and monetary incentives.⁵⁰⁰

⁴⁹⁰ See *supra* Part II.A.

⁴⁹¹ See Clarke Study, *supra* note 198, at 850.

⁴⁹² See *id.* at 848–849.

⁴⁹³ INTERNAL REVENUE SERV., FISCAL YEAR 2011 REPORT TO THE CONGRESS ON THE USE OF § 7623, 13, http://www.irs.gov/pub/irs-utl/fy2011_annual_report.pdf.

[<https://perma.cc/JJ78-52T6>] (explaining that some federal whistleblower laws prohibit retaliation but noting it is not prohibited in terms of tax whistleblowers since there is no federal law remedy although state law may provide otherwise).

⁴⁹⁴ See Aldinger, *supra* note 446, at 933.

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.* at 916.

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.* at 933–34.

⁴⁹⁹ *Id.* at 934.

⁵⁰⁰ Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1154 (2010).

In the context of a contentious, multi-year divorce proceeding, a primary motivating factor for the wife of a noncompliant spouse is shortening the proceedings. For example, if the wife is likely to be granted primary custody of children, she especially will want to end the proceedings as quickly as possible. The wife's eligibility for a whistleblower award may help to significantly shorten the division of assets portion of the divorce proceedings. Once her forensic accountants are able to uncover hidden offshore assets, theoretically she could whistle blow and share in a portion of the assets through the granting of a whistleblower award. In other words, if the wife can secure a whistleblower award, the division of assets proceedings will be truncated. The IRS will likely receive not only a single lead in regard to the noncompliant spouse's tax deficiencies but also several leads in terms of his partners and co-conspirators in defrauding the government. Again, a necessary element is that the wife could secure innocent spouse relief before blowing the whistle.⁵⁰¹

Granted, wives who did know or have reason to know about the noncompliant husband's offshore tax fraud and/or evasion and who decided to look the other way should not receive innocent spouse relief.⁵⁰² These wives may still choose to whistle blow, but of course, they would remain liable for the previously undisclosed tax liabilities.⁵⁰³ As stated above, the IRS has acknowledged some whistleblowers do have unclean hands, but it deems this acceptable given the role they may play in increasing tax enforcement.⁵⁰⁴ For example, there is a possibility that some wives who receive innocent spouse relief will in fact have conspired with their husbands against the government during the marriage and will choose to become whistleblowers. In order to minimize this possibility, the wife should be required to show the husband's noncompliance during the proceedings and evidence of efforts and expenditures to uncover his offshore accounts during the proceedings, e.g., the hiring of forensic accountants, filings of motions to compel, etc. Of course, the hiring of accountants could be gamed to feign lack of knowledge but that should occur infrequently. The relatively small number of cases where a wife has taken the same actions as one who had no knowledge or reason to know is justified by the increase in tax enforcement and related tightening of the tax gap in terms of offshore evasion.

At the same time, regardless of the desire to shorten the proceedings or for a reward, the wives described in Part II may decide to whistle blow for moral or religious reasons, reflecting the need to expose the deceitful behavior of what are likely abusive spouses. Monetary incentives are not always the major factor

⁵⁰¹ See *supra* Part II.C.

⁵⁰² See *supra* Part II.D. (arguing that financial abuse should negate a finding that the wife had knowledge or reason to know).

⁵⁰³ See *supra* Part II.B.

⁵⁰⁴ Aldinger, *supra* note 446, at 916.

in a whistleblower's decision, and "moral outrage,"⁵⁰⁵ religion or faith,⁵⁰⁶ and revenge"⁵⁰⁷ may serve as primary motivators. Whistleblowers also state a sense of "legitimacy" serves as a motivating factor.⁵⁰⁸ Here, "legitimacy" means a "feeling of obligation to obey the law and to defer to the decisions made by legal authorities."⁵⁰⁹ The factors from the Feldman and Lobel study certainly apply in the corporate or employment context, and some are also relevant to the divorce context. However, one must acknowledge other factors that are akin to the women who chose to report publicly in the #MeToo movement.⁵¹⁰ Many of the women who stepped forward to expose sexual harassment in the #MeToo movement were motivated by a sense of justice and a desire to embolden other women to speak out about their experiences with harassment.⁵¹¹ These same motivating rationales would be present in a high-net-worth divorce involving abuse as well.

V. CONCLUSION

The Panama Papers have revealed that high-net-worth tax evaders use offshore accounts to hide money from the IRS as well as their spouses.⁵¹² As a result, offshore tax enforcement efforts must harness the potential of divorce proceedings to reduce the international tax gap. While the government and the IRS may lack the time and resources to find hidden offshore accounts, wives involved in high-net-worth divorce proceedings hire teams of forensic accountants for that very purpose. Currently, a wealthy husband who refuses to disclose offshore accounts to his wife is not held accountable in the tax context for his noncompliance in the divorce context. Given that willfulness must be proven to impose civil or criminal liability, family law discovery devices must be modified to ensure their knowing disregard of reporting obligations may be

⁵⁰⁵ Feldman & Lobel, *supra* note 500, at 1203 n.285.

⁵⁰⁶ See Eamon Javers, *Religion, Not Money, Often Motivates Corporate Whistleblowers*, CNBC (Feb. 12, 2011), <http://www.cnbc.com/id/41494697> [<https://perma.cc/4UF8-C4BQ>] (noting that some whistleblowers are "deeply religious people" and thus their faith provides a distinct identity separate from their corporate careers).

⁵⁰⁷ Jonathan Macey, *Getting the Word Out About Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading*, 105 MICH. L. REV. 1899, 1907 (2007); see also Ralph Vartabedian, *IRS 'Rewards-for-Snitches' Program Comes Under Fire*, L.A. TIMES (Apr. 15, 1998), <http://articles.latimes.com/1998/apr/15/news/mn-39499> [<https://perma.cc/6BG2-U3D9>] (noting some informants tip based upon greed and revenge).

⁵⁰⁸ See Paul Sullivan, *The Price Whistle-Blowers Pay for Secrets*, N.Y. TIMES, Sept. 22, 2012, at B1 (stating that some whistleblowers act out of a desire to "right a wrong").

⁵⁰⁹ Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 235 (2008) (defining legitimacy as "a feeling of obligation to obey the law and to defer to the decisions made by legal authorities").

⁵¹⁰ See Bennett, *supra* note 10.

⁵¹¹ See *id.*

⁵¹² See *supra* notes 6–10 and accompanying text.

proven. Moreover, such spouses should be deemed ineligible for tax amnesty programs after continued noncompliance.

The current denial of innocent spouse relief to the wives of noncompliant offshore tax evaders creates an unjust outcome. Without the assurance of innocent spouse relief, these women are left vulnerable to civil and criminal liability. Often wives in omitted income cases are denied innocent spouse relief because of a mismatch in terms of the “knowledge” requirement as applied to husbands versus wives. Willfulness on the part of the husband requires knowledge of the tax reporting obligations. However, “knowledge” that income was received, even where the source of such funds is unknown, disqualifies wives from innocent spouse relief. To solve this problem, an approach that takes into consideration the nature of domestic abuse, including financial abuse, is necessary. Domestic abuse is likely present in the divorce proceedings at issue since the high-net-worth tax evaders are typically the primary earners, and their hiding of assets is evidence of financial control. Revised Treasury Regulations must provide guidance in terms of what constitutes abuse and confirm that financial control is indeed circumstantial evidence of abuse.

The majority of the wives described in Part II necessarily had undergone financial abuse as evidenced by their need to hire forensic accountants and to file motions to compel in the divorce proceedings. This Article contends that financial abuse should serve as an appropriate ground for granting wives innocent spouse relief in the context of high-net-worth divorces involving noncompliant spouses. The presence of financial abuse in this context demonstrates that the wives did not have “knowledge” of the hidden offshore funds.

Ensuring that the wives of high-net-worth tax evaders are granted innocent spouse relief will empower their reporting of offshore tax fraud and evasion. This will lead to the uncovering of vast networks of offshore evasion as the partners and business associates of the high-net-worth tax evaders are disclosed as well. Empowering wives of offshore tax evaders to whistle blow on their husbands’ misdeeds will lead to greater offshore tax enforcement and shorten divorce proceedings. The empowerment of these women will also result in an important step forward in how the United States perceives and treats victims of abuse.